Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, et al.,

Petitioners,

v.

JEFF SESSIONS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals failed to fulfill its obligation of responsible appellate review by characterizing questions of law as questions of fact?

2. What are the appropriate standards for evaluating state interests in Section 2 vote dilution challenges?

PARTIES TO THE PROCEEDINGS

The petitioners, appellants below, are:

Southern Christian Leadership Conference of Alabama on behalf of its members and on behalf of a state-wide class of black voters;

Reverend John L. Alford, individually and on behalf of a class of black voters in the Fifteenth Circuit and District of Montgomery County;

Reverend Abraham Woods, Jr., individually and on behalf of a class of black voters in the Tenth Circuit and District of Jefferson County;

Reverend P. H. Lewis, individually and on behalf of a class of black voters in the Thirteenth Circuit and District of Mobile County;

George W. Grayson, individually and on behalf of a class of black voters in the Twenty-Third Circuit;

Charles Steele, Jr., individually and on behalf of a class of black voters in the Sixth Circuit;

Reverend John Nettles, individually and on behalf of a class of black voters in the Seventh Circuit;

Pearlean S. Jackson, individually and on behalf of a class of black voters in the Twentieth Circuit;

Reverend James Milton, individually and on behalf of a class of black voters in the Fifth Circuit;

Jesse R. Williams, individually and on behalf of a class of black voters in the Fourth Circuit;
Edwin L. Moss, individually and on behalf of a class of black voters in the Fourth Circuit;
Luther P. Carmichael, individually and on behalf of a class of black voters in the Fourth Circuit;
Mary K. Stovall, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County;
Arthur L. Sumbry, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County;
Albert Turner, individually and on behalf of a class of black voters in the Fourth Circuit;
J. S. Thomas, individually and on behalf of a class of black voters in the Fourth Circuit; and
Malcolm R. Newman, individually and on behalf of a class of black voters in the Twentieth Circuit.

The respondents, appellees below, are:
Alabama Attorney General Jeff Sessions;
Alabama Chief Justice Sonny Hornsby;
Alabama Secretary of State Billy Joe Camp;
Walker Hobbie, Jr., Probate Judge, Montgomery County;
Mike Bolin, Probate Judge, Jefferson County;
George Reynolds, Probate Judge, Jefferson County;

David G. Lightsey, Probate Judge, Bibb County;
Arthur C. Murray, Probate Judge, Calhoun County;
Emerson W. Thompson, Probate Judge,
Chambers County;
Phillip W. Jordan, Probate Judge, Cleburne County;
John W. Jones, Jr., Probate Judge, Dallas County;
E. Riley Lucas, Probate Judge, Hale County;
J. T. Harpe, Probate Judge, Henry County;
Cletus Yomans, Probate Judge, Houston County;
Alphonso Menefee, Probate Judge, Macon County;
Frank Riddick, Probate Judge, Madison County;
W. L. Noonan, Probate Judge, Mobile County;
Donald R. Cook, Probate Judge, Perry County;
Mack Diamond, Probate Judge, Randolph County;
Wallace K. Brown, Probate Judge, Russell County;
Donald Fox, Probate Judge, Tallapoosa County;
W. Hardy McCollum, Probate Judge, Tuscaloosa County; and
Jerry Boggan, Probate Judge, Wilcox County.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners seek a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its en banc decision rejecting petitioners' challenge under Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, to the judicial election system in use in various voting districts in Alabama.

OPINIONS BELOW

The Eleventh Circuit's en banc opinion is reported as SCLC v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (en banc). The panel opinion and the order vacating that opinion are reported at 18 F.3d 898 (11th Cir. 1994). The district court opinion is reported at 785 F.Supp. 1469 (M.D. Ala. 1992). The opinions are reproduced in the accompanying Appendix.

STATEMENT OF JURISDICTION

The Eleventh Circuit's decision was issued on June 14, 1995. On September 7, 1995, Justice Kennedy extended the time for filing this petition to and including October 12, 1995. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. See App. at 155.

STATEMENT OF THE CASE

In this case, plaintiffs claimed that the at-large system for electing circuit and district judges in various jurisdictions in Alabama violates Section 2 of the Voting Rights Act of 1965.[1] Plaintiffs also claimed that the circuit court configuration violates the Voting Rights Act by dispersing majority black counties into various majority white circuits.[2]

At trial, the defendants conceded that the first precondition set out in Thornburg v. Gingles, 478 U.S. 30 (1986) -- the ability of the minority to constitute a majority in a single-member district -- was satisfied in nine of the ten jurisdictions at issue. App. at 110-11. The defendants also conceded, and the trial found, that the second Gingles precondition -- the political cohesiveness of the racial minority -- was satisfied in every jurisdiction at issue. Id. at 111; R5-144-7. Although the parties disagreed sharply over the third Gingles factor -- whether the "white majority votes sufficiently as a block to enable it . . . usually to defeat the minority's

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[1] A listing of the ten jurisdictions at issue appears at pages 5-6 of the Appendix along with some basic demographic information. The major metropolitan areas in Alabama, including Birmingham (Jefferson County), Montgomery, and Mobile, were covered by the case.

[2] Petitioner raised constitutional claims as well but did not pursue them on appeal. The details of the challenge to the circuit court configuration are not relevant to the questions presented here.

preferred candidate," 478 U.S. at 51 -- the dispute was largely a function of a difference in approach rather than a difference over particular factual points. Focusing on voting patterns in contests between black and white candidates and on the history of black electoral success, the plaintiffs contended that black voters were denied an equal opportunity to elect candidates of their choice. Focusing primarily on elections between white candidates, the success of black incumbents first appointed to office, and the relatively small number of black lawyers, the defendants advocated -- and the trial court reached -- the opposite conclusion.

a. Black vs. White Contests and the History of Black Electoral Success

The plaintiffs' statistical expert, Dr. Alan Lichtman, examined virtually every election that included both black and white candidates from 1980 through 1990 in the jurisdictions at issue. His analyses revealed stark patterns of polarized voting. "For nearly 300 elections covering some twenty different public offices during a ten-year period, black voters generally lined up very strongly behind black candidates, whereas white voters generally lined up very strongly behind white candidates." Pl. Ex. 95 at 8. The pattern of strong black cohesion and minimal white crossover voting occurred in every jurisdiction at issue. See App. at 114 (cohesion and crossover figures by circuit).

Based upon the actual pattern of polarized voting in each circuit, Dr. Lichtman made projections of the vote a black candidate could be expected to receive given the relative levels of black/white registration and turnout. "In every circuit under scrutiny [he] projected that white bloc voting would generally enable white candidates to defeat black competitors." Pl. Ex. 95 at 9; see Pl. Ex. 100 (projections by circuit).

The actual experience of black candidates for county offices in the circuits at issue buttressed Dr. Lichtman's formal statistical analyses. Black electoral success in every county has been limited almost exclusively to single-member districts and majority black counties. See, e.g., Pl. Exs. 76, 83-88. Of the black office holders in 1991 in the counties at issue, fully 93 percent represented single-member districts or majority black counties. Only 7 percent -- a mere 6 black officials, including 5 initially appointed to office -- served at-large in majority white counties. Of the 213 total officials who were serving at-large in the majority white counties at issue, 97 percent were white.

The 1991 figures were not atypical. With the exception of contests in majority black counties, the success of black candidates historically has been sporadic at best. Only after voting rights litigation created single-member districts did black candidates enjoy any significant measure of electoral

success in majority white jurisdictions.[3]

Faced with the prospect of almost certain defeat in majority white jurisdictions, black lawyers generally have been deterred from running for judicial positions. Similarly, the Alabama Democratic Conference, the state's major black political organization, has been deterred from sponsoring black judicial candidates. As the organization's long-time state field director explained, "because we find ourselves many times in circuits [that] are majority white, . . . we are not going to encourage black lawyers to get out here and compete in what we would think would be futile contests." R9 - 446; see R9 - 439. Instead of sponsoring black candidates, the organization typically has contented itself with choosing among white candidates. R9-432. Candidates endorsed in such contests are by no means necessarily the black preferred candidates. R9 -446-48. If the prospects for black political success improved, the organization would recruit black lawyers to run. R9 - 432 .[4]

In the history of the state, only one black candidate who

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[3]Alabama has a long "history of discrimination against black citizens, including a legacy of disfranchisement and segregation in most areas of life." App. at 17 n. 17.

[4]When the courts below referred to the Alabama Democratic Conference's "success in recruiting black candidates," App. at 11; id. at 113, they were apparently referring to nonjudicial races in majority black voting districts. There was no evidence that the organization recruited black judicial candidates in the majority white jurisdictions at issue.

was not an incumbent prevailed in a judicial contest in a majority white jurisdiction. App. at 11. Although he was successful, he still lost four out of five white votes. D. Ex. 33 at 38. He won simply because more black than white persons happened to vote in his particular election contest. See Pl. Ex. 311; R 13 - 1433-37.

Five other black candidates who were not incumbents had run for judicial office in majority white jurisdictions at issue prior to trial. Although the candidates generally received strong black support, none received a significant percentage of the white vote.

Faced with the prospect of certain defeat, black lawyers have had to rely almost exclusively on the appointment process to gain judicial positions. See Pl. Ex. 89; R7 - 273-76. An alternative route -- the election process -- has been open to whites. Among the white judges sitting in 1991, for example, 31 percent of the circuit judges and 53 percent of the district judges had come to the bench by way of the ballot box. Pl. Ex. 89. None of the black judges in majority white jurisdictions had followed a similar path. Id. Pl. Ex. 185. All of them had been appointed.

Once appointed to the bench, black judges usually have retained their positions. Armed with the power of incumbency and protected by the allegiance of their brethren, they often have not faced opposition. At least prior to trial, those who had been challenged -- with one sui generis

exception -- had won despite their typical failure to receive strong support from the white community.

b. Judicial Elections Generally and the Number of Black Lawyers

The defendants' expert, Dr. Ronald Weber, examined only judicial elections. His analyses demonstrated that judicial candidates who received the majority of the black vote usually have won. Combining circuit and district races, Dr. Weber established that the winning candidates received the majority of the black vote in at least 50 percent of the contested elections in each jurisdiction at issue D. Ex. 36; R13 - 1417.[5]

The vast majority of contested elections that Dr. Weber analyzed were races between white candidates. Of the 353 elections that he studied, only 43 (12 percent) involved black candidates. D. Ex. 36. Of these 43 contests, 30 involved the same black candidate.[6] Only 9 of the 43 black vs. white contests -- just 2.5 percent of the 353 total races analyzed -- involved black candidates who were not incumbents. These nine contests involved six different black candidates. Only

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[5]Dr. Weber also established that most judicial contests have been uncontested. D. Ex. 39; R13 - 1398. The presiding circuit judge in Mobile explained that judges "actively" discourage lawyers from running against them as a matter of "self-preservation." R12-1239-40.

[6]Because Justice Adams was involved in 3 electoral contests (1982 primary, 1982 primary runoff, 1988 general) and there are 10 circuits at issue, Dr. Weber counted 30 Adams' races. R13 - 1438.

one was successful.

Because his analyses were dominated by white vs. white contests, Dr. Weber acknowledged that his work shed no light on the question of whether black voters would have preferred to have had black candidates in the races.

> Q. How do you respond to the assertion that black voters actually prefer a black judicial candidate and the contests between two white candidates really [are] not informative about any important issue?
>
> A. Well, certainly, my analysis really can't answer that question. I mean I just have to be speculating based upon my analysis. . . .

R13 - 1429. He also acknowledged that his work offered little information about the chances of black judicial candidates. R13 - 1427. In response to questions from the court, he acknowledged that black judicial candidates would likely face polarized voting. R13 - 1483.

To Dr. Weber, the case posed a "trade-off." R13 - 1490-91. He acknowledged that additional black judicial candidates would come forward and be elected if the structure of the election system were changed to create new majority black voting districts. R13 - 1466, 1490-91. But, black electoral success, he testified, would come at the cost of diminished black influence over elections involving white candidates. R13 - 1490-91; see R13 - 1492-93. Numerous witnesses testified that the black vote often was crucial in such contests.

Dr. Weber linked the low number of black lawyers to the low number of black judges.[7] At the same time, he predicted that more black lawyers would run for judicial office in Alabama if a districting remedy were adopted, just as more black lawyers had offered themselves to the electorate in Mississippi after judicial redistricting in that state. R13 - 1466-67.

c. State Interests

In Houston Lawyers' Ass'n v. Attorney General, the Court indicated that a state's interest in, or justification for, an electoral practice would be "a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred." 501 U.S. 419, 426 (1991). At the trial of this case, evidence was presented about two aspects of the judicial election system -- the at-large feature and the numbered place requirement.

1. At-Large Feature

Circuit judges have been elected at-large since 1850. The at-large system is designed to hold judges "accountable to the public"; to provide "a linkage between [the judges and] the voters over whom the judges exercise power and authority."

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[7]In every jurisdiction at issue, the percentage of black lawyers is far lower than the percentage of black persons of voting age, and the absolute number of black lawyers in a few jurisdictions is very small. See App. at 10; Pl. Ex. 186; D. Exs. 89-115.

R11 - 878. According to the defendants' principal "state interest" witness, State Circuit Judge Lynwood Smith, this linkage balances the state's interests in judicial accountability and judicial independence. Without the at-large system, according to Judge Smith, judges will be tempted to favor litigants from their particular districts. R11 - 879, 881-88.

Many witnesses pointed out that Alabama judges already adjudicate disputes between residents of their circuits and persons who live elsewhere in the state without complaints or reports about favoritism. See R12 - 1343 (Judge Reynolds); R11 - 944 (Judge Smith); R10 - 755-56 (Judge Kennedy); R8 -398-39 (Judge Ford). Based on this fact, two judges testified that a districting remedy would not be likely to create pressure on judges to favor residents from their districts. R10 - 754-56 (Judge Kennedy); R8 - 397-99 (Judge Ford). One judge noted that "judges may tend to be more concerned about what lawyers think than what litigants think, because lawyers run against judges, not litigants." R10 - 756.

Plaintiffs presented testimony from witnesses familiar with the recently-adopted districting remedy adopted in the Mississippi judicial voting rights case. See Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988). A Mississippi circuit judge testified that he did not feel any pressure to favor persons from his district. Pl. Ex. 172. He noted that he typically does not know where litigants reside before they take the witness stand. A lawyer from Jackson, Mississippi, who served as

chairman of his county bench and bar relations committee, testified that the Mississippi system "operates the same as it did before there was subdistricting." Pl. Ex. 173 at 22. Smaller election districts have not created a problem of "home cooking."

As passionately as he felt about the dangers of a districting remedy in Alabama, Judge Smith acknowledged that existing features of the judicial system such as the judicial canons of ethics, the state judicial inquiry commission, the possibility of appeal, and the involvement of lawyers in judicial elections would help ameliorate potential problems. R11 - 902, 943-46. He also acknowledged that the use of multi-member majority white districts in combination with single-member majority black districts would dramatically reduce the problems he envisioned. R11 - 941. The presiding judge in Jefferson County (Birmingham) concurred. Pl. Ex. 174 at 65-66.

2. Numbered Place Requirement

The numbered place system was implemented for all multi-member state offices, including judicial positions, in 1927. Although not inspired by high-minded concerns over the integrity of the judicial system, the 1927 law was not motivated by racial animus. R12 - 1096-97.

According to Judge Smith, the numbered place system now serves a number of important purposes. With the numbered place system, a challenger must pick a particular judge to run against. Without the numbered place system, a

single challenger can force all the judges in a circuit into a re-election battle. Costly re-election campaigns, Judge Smith predicted, would become the norm rather than the exception. The "congeniality" of the bench would be destroyed as judges come to see their colleagues as their competitors. Good lawyers no longer would be interested in judicial careers. R11 - 889-93.

At trial, plaintiffs never suggested the use of a system that would force judges to run against each other. Instead, plaintiffs suggested a districting remedy.

d. The Decision of the District Court

In ruling against the petitioners, the district relied heavily on Dr. Weber's analysis of judicial races -- an analysis limited almost exclusively to white vs. white elections -- and repeatedly emphasized that "black preferred candidates" usually won. App. at 117, 128 - 142. In the few cases where black candidates had run without the benefit of incumbency, the court pointed to partisan politics or other factors to explain their defeats. See, e.g., id. at 134-35. Although acknowledging that it was reasonable to believe that incumbent black judges never would have won or even run for office in the first place had they not been appointed given "the perceived likelihood that they would not have succeeded," the court noted that most judges had come to the bench through the appointment

process. Id. at 116.[8]

Borrowing standards developed in employment discrimination cases, see id. at 120, the district court also compared the percentage of black lawyers to the percentage of black judges in the various jurisdictions at issue. On the basis of the comparison, the district court concluded:

> In the challenged circuits and districts where there are no black judges, the number of black lawyers is so small that the absence of a black judge would not cause one to conclude that the result was due to discrimination. The three circuits in which there is at least one black circuit judge -- the Tenth, Thirteenth and Fifteenth -- are also the circuits with the most judgeships and with the most black attorneys. In each of these three circuits, the number of black judges substantially exceeds the proportion of black lawyers to white.

Id. at 118. In denying petitioners relief, the court highlighted the number of black lawyers in each jurisdiction, and repeatedly emphasized that a remedy would result in a disproportionate percentage of black lawyers becoming judges. Id. at 118-21, 128-43.

Like Dr. Weber, the district court saw the case as posing a trade-off. The court recognized that changing the structure of

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[8]The district court opinion implied at one point that the court gave at least some weight to non-judicial races. App. at 111. But nothing in its discussion of the evidence reflects that it did so. See, e.g., id. at 113-17 (criticizing Dr. Lichtman's reliance nonjudicial races and emphasizing that Dr. Weber analyzed only judicial contests).

the election system would increase the number of black candidates elected to office; however; the court was of the opinion that enhancing the opportunity of black voters to elect black candidates would diminish their overall influence in the electoral process. Summarizing the evidence of vote dilution, the court stated:

> No one could find that election schemes in Alabama have reduced the minority vote to an empty formality or prevented minorities from substantially *influencing election outcomes.* As one witness after another has testified, the black electorate is decisive in *"influencing the outcome"* of elections and having their preferred candidate elected. . . . *The action sought by plaintiffs in this case would probably succeed in getting a small increase in the number of blacks elected to judgeships at a cost of diminished black political clout in all other judicial elections.*
>
> . . . .
>
> It does not require polarization of the races by districts to achieve *black influence* in the election process of judges. This Court agrees . . . that such polarization on balance could well be a step back in *black political influence*.

Id. at 145-46 (emphasis added)

When the court stated that "one witness after another" testified that "the black electorate is decisive in 'influencing the outcome' of elections," the court was referring to the testimony that black voters often had enough influence to be decisive in elections between *white* candidates. Compare id. at 115 (criticizing plaintiffs' expert for failing to analyze "whether blacks have the ability to influence the outcome of

the great majority of elections which are those where whites oppose whites") with id. at 117 (crediting defense expert who analyzed primarily white vs. white contests). The court had made the same point at the close of all the evidence.

> [A]t least where whites are running against whites, blacks can form a crucial part of the whites' election to office, and to that extent they are -- I don't know what the Supreme Court's term is, but to that extent they are sharing in the political process. And I know that the point of the Plaintiffs relates to there's not enough black participation and that you can't really say that somebody has participated adequately in the political process if they can't get one of their race in the number. I understand both of those points.

R13 - 1507-08 (remarks by the court).

On the question of the interests served by the current judicial election system, the court ruled that the state has a "legitimate" or "strong," but not compelling interest in maintaining the at-large feature of the election system. App. at 144. Although the court found that a districting remedy was "feasible in certain circuits," it cautioned that the possibility that such a system would foster judicial favoritism "should not be ignored." Id. at 126-27. The court also ruled that the state has "a compelling interest" in the numbered place system because it allows judges to run for re-election without competing against each other. Id. at 144-45; see id. at 121-22. Finally, the court ruled that the state has a "compelling state interest in having the pool of black lawyers large enough

to give the voters a pool of reasonable size from which to make a selection." Id. at 127. The court felt that this third interest would be compromised by a districting remedy. Id. at 127-28, 145.

e. The Decision of the Court of Appeals

Before the Court of Appeals, the petitioners raised numerous challenges to the trial court's vote dilution analysis and a key aspect of its "state interest" analysis. Petitioner contended that the "primary issues" raised by the appeal concerned "errors of law or findings based on misunderstandings of the law." En Banc Brief of Appellants at 21, SCLC v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (No. 92-6257). Those issues included:

> (i) the contention that the district court applied the wrong standard by focusing on whether black voters had an opportunity to "influence[e] election outcomes," App. at 145, rather than on whether they had an equal opportunity "to elect representatives of their choice," 42 U.S.C. § 1973(b);
>
> (ii) the contention that the district court should not have relied on elections involving only white candidates in determining whether candidates preferred by black voters had been successful given that polarized voting had deterred black candidates from running and black political

organizations from sponsoring black candidates;
(iii) the contention that the district court should have compared the percentage of black judges to the percentage of black voters, not the percentage of black lawyers, in assessing vote dilution ; and
(iv) the contention that the district court should not have ruled that the pool of black lawyers was so small that a remedy would compromise a compelling state interest given that the state itself had never asserted such an interest in the district court.[9]

Id. at 23-41.

In addition to contending that vote dilution had been established as a matter of law, petitioners argued that it was not necessary to remand the case to consider the question of whether the state's interest in the challenged system might "outweigh proof of racial vote dilution." Houston Lawyers' Ass'n v. Attorney General, 501 U.S. at 427. Petitioners pointed out the district court already had ruled that a districting remedy was "feasible in certain circuits," App. at 126, and had declined the state's invitation that it rule that the state had a "compelling" interest in maintaining its at-large system. En

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[9]The reason the state did not assert such an interest is clear: it already selects numerous judges from pools no larger than those which the district court assumed to be too small. See D. Ex. 76; App. at 65-66 (Hatchett, J.).

Banc Brief of Appellants at 53-55. Petitioners argued that a state interest could preclude a remedy only if that interest were compelling and could not be protected in the absence of the challenged dilutive device. Id. at 51-53.

In affirming the judgment of the district court, the court of appeals did not address any of the legal issues raised by the petitioners. Instead, the Court subsumed all the challenges to the district court's vote dilution analysis under the rubric of a challenge to the court's ultimate factual finding on the dilution question, a finding subject to the "clearly erroneous" standard. App. at 21-22.[10] On this issue, the court of appeals ruled that there was "ample evidence in the record to support the [district] court's conclusion that factors other than race, such as

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[10]The court of appeals also stated that "Appellants do not question any of the district court's findings on the subsidiary issues of historical fact" other than "the district court's treatment of the expert testimony." 56 F.3d at 1292 & n. 21. This statement is simply not accurate. See, e.g., En Banc Brief of Appellants at 38-40 (challenging the finding that small number of black judges is caused by small number of black lawyers); id. at 41 (challenging the finding that pool of black lawyers is too small to implement districting remedy); id. at 42-43 (challenging the finding that black and white registration rates are approximately the same); id. at 43 (arguing that district court failed to consider that black voters typically have lower turnout rates than whites); id. at 45-46 (arguing that district court failed to consider that pendency of lawsuit affected black political success); id. at 46-47 (challenging the finding that party preference explains polarized voting in certain circuits); id. at 48 (challenging the finding that black candidates have enjoyed success in at-large elections in one circuit). The court of appeals did not discuss these issues.

party politics and availability of qualified candidates, were driving the election results and that racially polarized voting did not leave minorities with 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" Id. at 25 (citation omitted).[11]

The court of appeals construed the trial court's opinion to rest on the alternative holding that a districting remedy was "not feasible." Id. at 4; see id at 25-26 After canvassing the potential dangers of a districting remedy, the court concluded that the trial court had not erred in rejecting the option. Id. at 30-33. In evaluating the feasibility of a districting remedy, the appellate court considered the "State's interest in having a pool of black lawyers large enough to give the voters a reasonable choice from which to select a qualified candidate," Id. at 30; see id. at 31, despite the fact that, as petitioners pointed out, the state had not claimed it had such an interest in the district court.[12] Apparently because of the court's

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[11]In the court of appeals, the petitioners challenged the finding that party politics, rather than race, explained polarized voting in certain elections. Petitioners pointed out that the state's own expert admitted that race and party were "operating at the same time" and argued that the presence of polarized voting in party primaries undercut any partisanship explanation. Petitioners also pointed out that white Democrats had won while black Democrats had lost. See En Banc Brief of Appellants at 46-47. The court of appeals did not discuss the petitioners' contentions.

[12]See En Banc Brief of Appellants at 40-41. The state did not

earlier holding that a voting rights plaintiff must show that "*within the state's judicial model*, there exists an alternative election scheme that could serve as an appropriate section 2 remedy," Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir. 1994) (en banc) (emphasis added), cert. denied, 115 S.Ct. 1795 (1995), the court did not consider the evidence of the successful districting remedy that had been implemented in Mississippi.

Concurring, Judge Edmondson expressed the view that Alabama's interest in maintaining its current judicial election system precluded any remedy as a matter of law given that the system was "neither irrational nor . . . rare" and had not been "drawn up to discriminate against any Alabama citizens on account of race." App. at 34. Under his view of the law, Judge Edmonson explained that:

> No need exists to look at winners and losers of past elections or to speculate about why particular judicial candidates won and others lost. Most important, no need (and I think no rightful, federal judicial power) exists to compare the strength and weaknesses--as a matter of political science--of Alabama's current system of electing trial judges with the system for which plaintiffs contend.

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contend that it had raised the point; instead, it contented itself with the claim that the interest was one "which, if not explicitly contended by the state, was fairly inferred from the evidence." Panel Brief of Appellees at 34, SCLC v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (No. 92-6257).

Id. at 35.

Dissenting, Judge Hatchett expressed the view that petitioners had "demonstrated a section 2 violation, for which a remedy can, and must, be employed." Id at 38. "Unlike the majority," Judge Hatchett did "not defer, under the clearly erroneous standard, to the district court because it committed", in Judge Hatchett's view, "several legal errors in arriving at its findings" on the vote dilution question. Id. at 51. On the issue of remedy, Judge Hatchett also did "not defer to the district court's findings because," according to Judge Hatchett, "the issues of remedy and 'the substantiality of [Alabama's] interest under § 2 [are] question[s] of law for this court to determine *de novo*.'" Id., citing League of United Latin American Citizens v. Clements, 999 F.2d 831, 871 (5th Cir. 1993) (en banc), cert. denied, 114 S.Ct. 878 (1994).

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT, BY CHARACTERIZING THE QUESTIONS BELOW IN A MANNER INCONSISTENT WITH THIS COURT'S DECISION IN THORNBURG V. GINGLES, HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

In Thornburg v. Gingles, the Court reaffirmed its "view that the clearly - erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." 478 U.S. at 79. But the Court also observed that "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" Id., quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 501 (1984). Appellate courts not only have the power to correct errors of law, they have the duty to do so. See Salve Regina College v. Russell, 499 U.S. 225 (1991).

In this case, the court of appeals was not confronted with "the vexing nature of the distinction between questions of

facts and questions of law." Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). Instead, it was clearly presented with numerous legal issues: whether the district court applied the wrong standard by focusing on black voters' opportunity "to influence" elections rather than on their opportunity "to elect" candidates of their choice;[13] whether the district court focused on the wrong elections when it relied on the results of white vs. white contests given that black candidates had been deterred from running;[14] whether the district court should have treated the case like an employment discrimination dispute and compared the percentage of black lawyers to the percentage of black judges;[15] and whether the district court

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[13]See 42 U.S.C. § 1973 (violation of amended § 2 shown by establishing that minority has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

[14]In cases where a minority group has sponsored few, if any candidates -- for example, in cases such as this one where minority candidates have been deterred -- there are always numerous white v. white elections that can be analyzed. It is precisely because such elections have little probative value that the Court emphasized in Thornburg v. Gingles that the lower "courts must rely on other factors that tend to prove unequal access to the electoral process" in such cases. 478 U.S. at 57 n. 25.

[15]See Marshall v. Edwards 582 F.2d 927, 936 (5th Cir. 1978)(Wisdom, J.)("necessary link between the percentage of those eligible and the percentage actually selected that exists in . . . employment cases is missing in voting cases"), cert. denied, 442 U.S. 909 (1979).

was empowered to credit state interests that the state itself did not contend that it had.[16]

Instead of addressing the legal issues presented, the court of appeals subsumed them all under rubric of a challenge to the sufficiency of the evidence underlying the district court's ultimate factual finding on the issue of vote dilution. See Id. at 21-22. The characterization may have determined the outcome of the case.

"The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's [legal] determinations." Salve Regina College v. Russell, 499 U.S. at 231. Because this case concerns the voting rights of hundreds of thousands of black citizens in Alabama, the Court should grant review to consider whether the court of appeals mischaracterized the questions raised below and failed to fulfill its "obligation of responsible appellate review." Id. at 239.

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[16]This listing does not include all the legal issues raised below. See En Banc Brief of Appellant.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE PROPER TREATMENT OF STATE INTERESTS IN VOTING RIGHTS CASES

Between the passage of the 1982 amendments to the Voting Rights Act and the Court's 1991 decision in Houston Lawyers' Ass'n v. Attorney General, 501 U.S. 419, a state's interest in a challenged electoral practice was considered a minor factor in the Section 2 "totality" inquiry. See S. Rep. No. 417 at 29 & n. 117, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 177, 207 [hereinafter, "Senate Report"]. More importantly, it was considered a factor that cut in only one direction. If a state's interest in a challenged device was tenuous, it was typically considered "circumstantial evidence that the device had a discriminatory result" or was "unfair." E.g., United States v. Marengo County Comm'n, 731 F.2d 1546., 1571 (11th Cir.) cert. denied, 469 U.S. 976 (1984). But, in accordance with the legislative history, it had been understood in the lower courts that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." Senate Report at 29 n. 117; see, e.g., United States v. Marengo County Comm'n, 731 F.2d at 1571.

The Houston Lawyers decision changed this

understanding. The Court ruled not only that a "State's justification for its electoral system is a proper factor . . . to assess in a racial vote dilution inquiry," but also that the state's interest could "outweigh proof of racial vote dilution" in a given case. Houston Lawyers' Ass'n v. Attorney General, 501 U.S. at 427.

Since the Houston Lawyers' decision, the courts of appeal have taken conflicting approaches to the assessment of state interests in vote dilution cases. In the Fifth Circuit, the weight of a "state interest, determined as a matter of law, is balanced against . . . evidence of racial vote dilution." League of United Latin American Citizens v. Clements, 999 F.2d at 868. Likewise, the Sixth Circuit has held that the state interest must be weighed "against" evidence of vote dilution "in evaluating the totality of circumstances." Cousin v. McWherter, 46 F.3d 568, 577 (6th Cir. 1995).

In the Eleventh Circuit, on the other hand, a state's interest "has minimal relevance in the totality of circumstances analysis," Nipper v. Smith, 39 F.3d at 1542; see id.. ("State's linkage interest is of little, if any, relevance in [racial bias] inquiry"), but "a major role" in determining whether there are feasible, alternative remedies to the challenged electoral system. Id. Not only does the plaintiff have the burden of establishing a feasible, alternative remedy as a "threshold" matter, he or she must also establish that the remedy is "within the confines of the state's judicial model." Id. As this

case illustrates, the fact that a remedy has proven to be feasible in another state is apparently of no consequence. See App. at 70 (Hatchett, J., dissenting) (discussing Mississippi districting plan not discussed in majority opinion). While the Fifth and Sixth Circuits consider the weight of a state interest to be a question of law, the Eleventh Circuit treats the issue of the feasibility of an alternative remedy that may compromise a state interest as a question of fact.

In petitioners view, neither the approach taken by the Fifth and Sixth Circuits nor that taken by the Eleventh Circuit is correct. Because every voting rights case involves a matter at the heart of a state's system of self-government -- one of its electoral practices -- the weight to be accorded a state interest cannot be settled by a resort to maxims about federalism and state sovereignty in the manner suggested by the Fifth Circuit. See League of United Latin American Citizens v. Clements, 999 F.2d at 871-73. In evaluating the weight or preclusive effect to be given to a state interest, the lower courts should determine whether the state already allows practices that compromise its purported interest, whether there are other ways for the state interest to be protected in the absence of the challenged dilutive device, and whether there are ways to remedy vote dilution even if the dilutive device is retained. In no event should a lower court be permitted to credit an interest that the state does not contend that it has. Deferring to trial court decisions on the issue of whether a remedy is

"feasible" without establishing standards to guide the inquiry risks subordinating the federal interest in eradicating vote dilution to state concerns.[17]

However state interests should be assessed, the Court should grant review here to resolve the conflict in the circuits and to provide guidance to the lower courts. There are numerous pending voting rights challenges to judicial election schemes. See Ann. M. Scruggs, et al., Recent Voting Rights Act Challenges to Judicial Elections, 79 Judicature 34 (1995). Given that the Court has not limited consideration of state interests to voting rights cases challenging judicial elections, see Houston Lawyers' Ass'n, v. Attorney General, 501 U.S. 426-27, the issue is now arising in non-judicial voting rights cases as well. See, e.g., Marylanders for Fair Representation, Inc. v. Schaffer, 849 F.Supp. 1022, 1062-63 (D. Md. 1994) (three-judge court) (challenge to state legislative redistricting plan).

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[17]These arguments were raised below. See En Banc Brief of Appellants at 51-53.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, et al.,

Petitioners,

v.

JEFF SESSIONS, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6257

District Court No. 88-H-00462-N

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF ALABAMA on behalf of its members and on behalf of a statewide class of black voters; REVEREND JOHN L. ALFORD, individually and on behalf of a class of black voters in the Fifteenth Circuit and District of Montgomery County; REVEREND ABRAHAM WOODS, JR., individually and on behalf of a class of black voters in the Tenth Circuit and District of Jefferson County; REVEREND P.H. LEWIS, individually and on behalf of a class of black voters in the Thirteenth Circuit and District of Mobile County; GEORGE W. GRAYSON, individually and on behalf of a class of black voters in the Twenty-Third Circuit; CHARLES STEELE, JR., individually and on behalf of a class of black voters in the Sixth Circuit; REVEREND JOHN NETTLES, individually and on behalf of a class of black voters in the Seventh Circuit; PEARLEAN S. JACKSON, individually and on behalf of a class of black voters in the Twentieth Circuit; REVEREND JAMES MILTON, individually and on behalf of a class of black voters in the Fifth Circuit; JESSE R. WILLIAMS, individually and on behalf of a class of black voters in the Fourth Circuit; EDWIN L. MOSS, individually and on behalf of a class of black voters in the Fourth Circuit; LUTHER P. CARMICHAEL, individ-

ually and on behalf of a class of black voters in the Fourth Circuit; MARY K. STOVALL, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County; ARTHUR L. SUMBRY, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County; ALBERT TURNER, individually and on behalf of a class of black voters in the Fourth Circuit; J. S. THOMAS, individually and on behalf of a class of black voters in the Fourth Circuit; and MALCOLM R. NEWMAN, Individually and on behalf of a class of black voters in the Twentieth Circuit,

Plaintiffs-Appellants,

versus

ATTORNEY GENERAL JEFF SESSIONS; CHIEF JUSTICE SONNY HORNSBY; SECRETARY OF STATE BILLY JOE CAMP; WALKER HOBBIE, JR., Probate Judge, Montgomery County; MIKE BOLIN, Probate Judge, Jefferson County; GEORGE REYNOLDS, Probate Judge, Jefferson County; DAVID G. LIGHTSEY, Probate Judge, Bibb County; ARTHUR C. MURRAY, Probate Judge, Calhoun County; EMERSON W. THOMPSON, Probate Judge, Chambers County; PHILLIP W. JORDAN, Probate Judge, Cleburne County; JOHN W. JONES, JR., Probate Judge, Dallas County; E. RILEY LUCAS, Probate Judge, Hale County; J.T. HARPE, Probate Judge, Henry County; CLETUS YOMANS, Probate Judge, Houston County; ALPHONSO MENEFEE, Probate Judge, Macon County; FRANK RIDDICK, Probate Judge, Madison County; W. L. NOONAN, Probate Judge, Mobile County; DONALD R.

COOK, Probate Judge, Perry County; MACK DIAMOND, Probate Judge, Randolph County; WALLACE K. BROWN, Probate Judge, Russell County; DONALD FOX, Probate Judge, Tallapoosa County; W. HARDY McCOLLUM, Probate Judge, Tuscaloosa County; JERRY BOGGAN, Probate Judge, Wilcox County,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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(June 14, 1995)

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH and BLACK, Circuit Judges.*

TJOFLAT, Chief Judge:

Appellant Southern Christian Leadership Conference ("SCLC") and the individual appellants are the class representative of the black voters in Alabama.[1] They appeal the district court's decision, *Southern Christian Leadership Conference ("SCLC") v. Evans*, 785 F. Supp. 1469 (M.D. Ala. 1992), reached following a bench trial, rejecting their claim that Alabama's system for electing circuit and district judges in ten of Alabama's judicial circuits affords the black voters in those circuits,

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* Judges Dubina, Carnes and Barkett did not participate in the consideration or decision of this case.

[1] For ease of discussion we refer to appellants as the black voters in the ten judicial circuits under scrutiny in this case.

on account of their race, "less opportunity...to participate in the political process" than other members of the electorate are afforded in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988).[2]

The district court rejected appellants' claim on two grounds. First, appellants' opportunity to participate in the election of the judges in question is not being abridged on account of their race. Second, the remedies they seek are not feasible alternatives to the electoral systems presently in place. We affirm.

I

A.

Alabama has a "unified judicial system" of trial and appellate courts. The trial courts of general jurisdiction are the circuit courts, and the district courts are courts of limited jurisdiction. Ala. Code § 12-1-2 (1986). Currently

[2] Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988), provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

there are forty judicial circuits in Alabama, each designated by a number; each circuit contains one or more counties. *See id.* § 12-11-2 (Supp. 1993).[3] There is a separate district court within each county.[4] *Id.* § 12-12-1 (1986).

Appellants challenge the system for electing circuit judges in the following ten judicial circuits:

Fourth Circuit—Bibb, Dallas, Hale, Perry, and Wilcox Counties

Fifth Circuit—Chambers, Macon, Randolph, and Tallapoosa Counties

Sixth Circuit—Tuscaloosa County

Seventh Circuit—Calhoun and Cleburne Counties

Tenth Circuit—Jefferson County

Thirteenth Circuit—Mobile County

Fifteenth Circuit—Montgomery County

Twentieth Circuit—Henry and Houston Counties

Twenty-Third Circuit—Madison County

Twenty-Sixth Circuit—Russell County

The appellants also challenge the district court election systems in Jefferson, Mobile, Montgomery, and Russell Counties. The challenged circuits include a majority of the state's population and represent both urban and rural areas within Alabama. Basic demographic information about these circuits and districts[5] is summarized in the following chart.

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[3] The legislature, with the advice of the Alabama Supreme Court, has the authority to change the number and boundaries of the circuits. Ala. Const. amend. 328, § 6.12.

[4] Court business is conducted largely at the county level. Venue is defined in terms of counties. Ala. Code § 6-3-2 (1986). Each county has a courthouse, *see id.* § 12-11-3, circuit court clerk, id. § 12-17-90, and separate jury commission, *id.* § 12-16-30.

[5] This is the demographic information that was presented to the district court.

CHARACTERISTICS OF CHALLENGED CIRCUITS

Circuit	Total Population	% of Black Voting Age Population	Circuit Judges (white/black)	District Judges (white/black)
4th	106,531	49%	2/0	—
5th	120,511	38%	3/0	—
6th	150,522	23%	3/0	—
7th	128,764	16%	4/0	—
10th	651,525	32%	24/3	11/0
13th	378,643	28%	10/1	4/1
15th	209,085	38%	7/1	3/0
20th	96,705	22%	3/0	—
23rd	238,912	19%	6/0	—
26th	46,860	36%	2/0	2/0

Nine counties in Alabama have a black majority voting age population: Bullock, Dallas, Greene, Hale, Lowndes, Macon, Perry, Sumter, and Wilcox. These counties are currently grouped into five separate judicial circuits. Only one of the five circuits, the Seventeenth, has a black majority of the voting age population.[6]

Judicial elections in Alabama are partisan. See id. § 17-7-1 (Supp. 1993). Judges on Alabama's trial courts are elected at-large from their circuits or districts. *Id.* § 17-2-2. One of the challenged circuits has twenty-four circuit judges while others have as few as two. Each county, however, has at least one district judge. Candidates for judicial office in circuits or

[6] The election systems in the Seventeenth Circuit and Bullock, Greene, Lowndes, and Sumter Counties have not been directly challenged by appellants.

districts with more than one judge must run for a particular position (a "post") on the ballot; this is known as a numbered place system.

The Governor has the authority to fill midterm judicial vacancies, such as those that occur when a sitting judge dies, resigns, retires, or is removed from office. Ala. Const. amend. 328, § 6.14. This power of appointment is limited in four of the challenged circuits by judicial nominating commissions' that solicit candidates, review their credentials, and certify a list of names to the Governor. In all four of these circuits, the Governor must appoint one of the people from the list to the vacant position. These four circuits contain forty-five of the sixty-six challenged circuit judgeships.

B.

Alabama's system of at-large election of circuit court judges dates from 1850 when article V, section 12 of Alabama's 1819 Constitution was amended to require the General Assembly to "provide by law for the election of judges of the Circuit Courts by the qualified electors of their circuits respectively." Ala. Const. amend. 3 (1850). The 1865 Constitution required that "judges of the circuit and probate courts, and of such other inferior courts as may be by law established, shall be elected by the qualified electors of the respective counties, cities, or districts for which such courts may be established." Ala. Const. art. VI, § 11 (1865). Similar provisions were retained in the 1875 and 1901 Constitutions. *See* Ala. Const. art. VI, § 12 (1875); Ala. Const. art. VI, § 152 (1901). In 1973, Amendment 328, which is known as the Judicial Article, repealed article VI of the 1901 Constitution and provided that "[a]ll judges shall be elected by vote of the electors within the territorial jurisdiction of their respective

courts." Ala. Const. amend. 328, § 6.13 (1973).[8] It is section 6.13 that currently requires at-large elections of circuit and district judges.

Similarly, Alabama has a long history of employing a numbered place system. The State first enacted statewide legislation requiring the use of at-large numbered positions for the election of circuit judges in 1927. At that time, there were no black attorneys in Alabama, and blacks were largely disfranchised. The historical context of the 1927 law reveals that the measure was promoted by conservative elements within the Democratic Party who felt threatened by victories in the 1926 elections by rival Progressive/Prohibitionist/Ku Klux Klan factions. In 1961, the Alabama Legislature passed Act 221, which expanded the use of numbered places to elect all multimember offices. Because judges were already elected under an at-large numbered place system, Act 221 did not change the judicial electoral process. The Judicial Article and reform movement of the 1970s also did not attempt changes from a popularly elected judiciary. Moving toward an appointment system would have garnered opposition from many Alabamians and would have lead to the defeat of the Judicial Article because enactment required voter approval. *SCLC v. Evans*, 785 F. Supp at 1490.

A.

Judges must be licensed to practice law in Alabama.

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[8] District judges are required to have resided in their districts for at least 12 months prior to their election or appointment and must continue to reside in their district during their tenure in office. Ala. Code § 12-17-64 (1986). Similarly, circuit judges are required to have resided in their circuits for at least 12 months prior to their election or appointment to office and must continue to reside in the circuit while in office. Ala. Const. art. VI, § 142 (1901); Ala. Code § 12-17-22 (1986).

Ala. Const. amend. 328, § 6.07. Records of the Alabama State Bar reflect the following about the admission of black lawyers to the state bar:

CUMULATIVE ADMISSIONS INTO ALABAMA STATE BAR

Year	Number Admitted	Cumulative Total Admitted
1927	0	0
1937	1	1
1938	1	2
1947	1	3
1948	2	5
1950	1	6
1951	2	8
1953	2	10
1954	1	11
1957	1	12
1958	3	15
1959	2	17
1960	1	18
1961	1	19
1966	1	20
1967	1	21
1968	2	23
1971	2	25
1972	3	28
1973	7	35
1974	7	42
1975	10	52
1976	13	65
1977	10	75
1978	5	80

Year	Number Admitted	Cumulative Total Admitted
1979	17	97
1980	10	107
1981	15	122
1982	28	150
1983	7	157
1984	20	177
1985	7	184
1986	8	192
1987	15	207
1988	22	229
1989	26	255
1990	19	274
1991	21	295

The records of the Alabama State Bar indicate the following about the race of active lawyers holding a regular license to practice law in the challenged circuits:

ACTIVE LAWYERS BY CIRCUIT BY RACE

Circuit	No. Black	% Black	No. White	% White
4th	15	16.3	77	83.7
5th	13	14.6	76	85.4
6th	12	3.3	357	96.7
7th	6	4.1	140	95.9
10th	105	3.5	2909	96.4
13th	20	2.1	934	97.8
15th	56	5.3	1003	94.7
20th	5	3.4	142	96.6
23rd	15	3.3	445	96.3
26th	4	7.6	49	92.4

Until the late 1960s, black students were not admitted to the only accredited law school at that time in Alabama, the University of Alabama School of Law; the first black law student did not graduate until 1972. In the 1950s, the Alabama State Bar openly supported segregation legislation. Several local, voluntary bar associations effectively excluded blacks from membership—one until 1975. Currently, however, the University of Alabama School of Law and the Cumberland School of Law, a private institution, routinely admit black students. The Alabama State Bar has organized efforts to increase the number of blacks on the bench—as recently as 1990, by creating a Task Force on Minority Participation and Opportunity.

The Alabama Democratic Conference ("ADC") is a statewide black political caucus that is an arm of the state Democratic Party. It has had success in recruiting black candidates and supporting their campaigns. The ADC has also been active in choosing among white judicial candidates and organizing support for its preferred candidates.[9]

Only one black candidate for the trial bench who was not an incumbent has prevailed in a judicial election contest in a majority white jurisdiction. In 1976, Ralph Cook won a primary election in the Bessemer division of Jefferson County and ran unopposed in the general election for a district court judgeship. Five other nonincumbents have run for judicial office in majority white jurisdictions and lost:

1. Nathaniel Owens

In 1980 Nathaniel Owens was elected district judge in the 7th Circuit, defeating a white opponent. During

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[9] The stated purpose of the ADC is to "endorse black and white candidates who will be responsive to the needs of blacks and poor people in Alabama." The majority of ADC endorsements have gone to white candidates.

his term on the district court, he unsuccessfully attempted to unseat a white incumbent circuit judge. He ran despite the discouragement of the black community. In 1986, Judge Owens ran unsuccessfully as a Republican for reelection to the district court. He did not garner the support of the black vote or of black political organizations, such as the ADC, which instead supported the white Democratic candidate.[10]

2. Emory Anthony and Raymond Chambliss

In the 1988 general election for district court in Jefferson County, Emory Anthony and Raymond Chambliss, both black Democrats, were defeated by white Republicans. The election results were driven largely by partisan politics. The black Democratic judicial candidates each received approximately 24 percent of the white vote while Governor Michael Dukakis, the Democratic candidate for President, received only 17 percent of the white vote in Jefferson County. The top white Democratic vote-getter received less than 40 percent of the white vote in the circuit.

3. Frankie Fields Smith

Frankie Fields Smith of the Thirteenth Circuit lost to a white candidate in the 1980 Mobile County district court primary election and to two white candidates in the 1986 Mobile County district court general election. In 1980, she was not rated as being well qualified by the bar[11] and got little support. In 1986, she was not the candidate preferred by black voters. She ran as an indepen-

[10] Judge Owens had alienated the black community by joining a white church, enrolling his children in a private school, supporting the white community's position in a controversial school location issue, and becoming a Republican, claiming that God had called on him to change his party affiliation.

[11] The record does not specify exactly what Frankie Fields Smith's bar rating was—it merely reflects that she did not receive a rating of "well qualified."

dent because she entered the race too late to qualify as a Democrat and, consequently, a substantial majority of black support went to the white Democratic candidate.

4. Al Beckles

In the Twenty-Third Circuit, Madison County, there has been only one judicial election involving a black candidate. Al Beckles, a black lawyer, was defeated in the 1990 Democratic primary election for district judge by a former assistant district attorney, who was a lifelong resident with strong connections countywide. The campaign was not marred by racial passion; indeed, the ADC gave the white candidate its co-endorsement.

Alabama's first black circuit judge was appointed in 1979. Since 1865, there have been five black circuit judges—all of whom first obtained that office by appointment. A black district judge was first appointed in 1977 in majority black Macon County. There have been nine black district court judges—one was grandfathered into office, three were elected, and five initially took office by appointment.

Once appointed, black judges have in most instances retained their positions. Justice Oscar Adams, for example, who had been the first black person elected to statewide office in Alabama, was appointed by the Governor in 1980 to serve on the Supreme Court of Alabama. Justice Adams won reelection in statewide races against well-known white opponents in the 1982 Democratic primary, the 1982 primary runoff, and the 1988 general election.[12] The current black circuit judges, all of whom were appointed to the bench, have, with one exception, been reelected without opposition. Only Judge Ralph Cook had a contested reelection bid; he was opposed by a white candidate shortly after his appoint-

[12] The record does not indicate whether Justice Adams had opposition in the 1982 general election. We assume that, having won the primary runoff, he ran unopposed.

ment in 1981, and was victorious. Judge Cook had no opposition in the 1988 election. Justice Adams retired from the Alabama Supreme Court in 1993, two years before the end of his term; Judge Cook was appointed to replace him on the court.[13]

II.

A.

This action was filed on May 11, 1988. Appellants named as defendants the Alabama Attorney General, the Chief Justice of the Alabama Supreme Court, the Alabama Secretary of State, and the county probate judges who administer the electoral systems in question.[14] Appellants alleged that the numbered, at-large elections these systems employ minimize the black voters' opportunity to participate in the political process and to elect representatives of their choice, and thus dilute their voting strength in violation of section 2 of the Voting Rights Act, 42 U.S.C.

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[13] To provide a current depiction of the composition of the bench we have taken judicial notice of information not available at the time the district court rendered its decision. Under Rule 201 of the Federal Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

[14] Appellants did not name as defendants the circuit and district judges whose offices would be affected by the injunctive relief appellants seek. Appellants' failure to name them, however, is not an issue in this appeal. Presumably, appellants sued the Attorney General, the Chief Justice, and the Secretary of State in the belief that these offices could create the new electoral system(s) such injunctive relief would mandate. The legislators, however, are the only officials who have the authority to alter the circuit boundaries in the manner appellants propose. *See supra* note 3.

§ 1973 (1988). Appellants also claimed that the judicial circuit boundary lines were drawn with the intent to fragment high concentrations of the black population, so that they could not elect blacks to office.[15]

To remedy this situation at the circuit court level, appellants sought an injunction that would realign the circuit boundaries and then divide the circuits into single or multimember electoral districts in a manner that would ensure that the black voters could elect candidates of their choice to office. To eliminate the vote dilution at the district court level, appellants asked the court to divide the four counties in question into districts, again to ensure the election of blacks to office.[16] Appellants' acknowledged that, if implemented, these remedies would eliminate the linkage between the judge's territor-

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[15] Appellants sought relief under the Fourteenth and Fifteenth Amendments to the United States Constitution as well as under § 2 of the Voting Rights Act. The district court found no constitutional violations and dismissed appellants Fourteenth and Fifteenth Amendment claims. Appellants do not challenge the dismissal of those claims in this appeal. Accordingly, no further mention of appellants' constitutional claims will be made in this opinion.

[16] At the time appellants brought this suit, the question was being debated whether § 2 of the Voting Rights Act applies to state judicial elections. In June 1989, the district court ruled that the Voting Rights Act does apply. *SCLC v. Siegelman*, 714 F. Supp. 511, 521 (M.D. Ala. 1989). Shortly thereafter, the Fifth Circuit decided, in *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 631 (5th Cir. 1990) (en banc) that judicial elections are not subject to § 2. Given this decision, the district court stayed the proceedings (other than discovery) in this case to allow appellees an opportunity to take an interlocutory appeal. When the Supreme Court held that state judicial elections are covered by § 2, *see Chisom v. Roemer*, 501 U.S. 380, 403, 111 S. Ct. 2354, 2368, 115 L. Ed. 2d 348 (1991); *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419, 424, 111 S. Ct. 2376, 2380, 115 L.Ed.2d 379 (1991) *(reversing League of United Latin American Citizens)*, the proceedings in the instant case resumed.

ial jurisdictions and their electorate and, moreover, would disfranchise the voters in their jurisdictions who reside outside the new electoral districts.

Appellees, in their answer, denied that the challenged election systems afford appellants less opportunity than other members of the electorate to participate in the political process and elect candidates of choice. Moreover, appellees contended that appellants' proposed remedies were unfeasible, given the State's legitimate interest in maintaining the linkage between a trial judge's jurisdiction and elective base and guaranteeing a pool of potential candidates large enough to give the voters a reasonable choice.

B.

The district court tried this case, in December, 1991, in accordance with the teaching of *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), a section 2 challenge to North Carolina's multimember legislative district scheme. *Gingles* holds that, to obtain relief under section 2 of the Voting Rights Act, the plaintiffs must establish the following: First, the plaintiffs must show that an appropriate remedy can be fashioned. In *Gingles*, the remedy was the creation of single-member districts in which the minority group the plaintiffs represented would constitute a majority sufficient to elect representatives of their choice. Second, the plaintiffs must show that the minority voters around whom the district is to be drawn are "politically cohesive." Third, the plaintiffs must show repeated bloc voting by the white majority such that the white majority usually defeats the minorities' preferred candidate. *Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67.

In ordering the proof, the district court initially

focused on the third *Gingles* prong: "whether there is polarized voting so that minorities have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *SCLC v Evans*, 785 F. Supp. at 1472-73.[17] On this issue, both sides offered voluminous statistical evidence and expert testimony interpreting that evidence. The experts are veterans of voting rights litigation. The appellants relied on the testimony of Dr. Allan Lichtman, Professor of History at American University in Washington, D.C. The appellees offered the testimony of Dr. Ronald Weber, Professor of Government at the University of Wisconsin. The experts in this case used substantially the same techniques—ecological regression

[17] The court, and the parties, addressed the matter of polarized voting after the facts recited in part I *supra* had been established. Also established was Alabama's history of discrimination against black citizens, including a legacy of disfranchisement and segregation in most areas of life. Blacks had been systematically excluded from law schools, grand and petit juries, had sat in segregated court rooms, and had been confined in segregated prisons. Statistical evidence showed that in every circuit at issue blacks have substantially lower median incomes than whites and are substantially more likely to have incomes that fall below the poverty line. Blacks have lower rates of high school and college graduation than whites and are more likely to be unemployed. Finally, racial appeals had been present in some judicial election contests; some were ineffective, however, and at least one backfired. As the district court observed:

> One...subtle racial appeal was in the Democratic Party primary in 1982 which involved a newspaper ad run by a white candidate contrasting the pictures of the white candidate and Justice Adams. The appeal was ineffective as Justice Adams was the successful candidate. In the Twentieth Circuit (Mobile), the white candidate in the Democratic primary in the 1990 district judge race made a racial appeal intended to work against Judge Thomas, a black. The tactics in both races were condemned, and Judge Thomas credited his opponent's racial appeal with causing a backlash against the white candidate which aided his election.

SCLC v. Evans, 785 F. Supp. at 1473.

and extreme case analysis—that were approved and utilized by the Supreme Court in *Gingles*. *See Gingles*, 478 U.S. at 61, 106 S. Ct. at 2772. Although the experts used the same or similar techniques, they differed sharply over which elections should be analyzed to determine whether voting has been and continues to be racially polarized.

Dr. Lichtman studied elections in which black candidates competed against white candidates and did not confine his analysis to judicial elections. He analyzed approximately 300 elections of twenty different offices over a ten-year period. Dr. Lichtman's conclusions are summarized below:

BLACK COHESION AND WHITE CROSSOVER: 1980S ELECTIONS

Circuit	Black Cohesion %	White Crossover %
4th	85	15
5th	74	21
6th	76	20
7th	79	25
10th	88	22
13th	77	20
15th	70	22
20th	73	20
23rd	84	22
26th	73	16

Dr. Weber, however, declined to limit his analysis to campaigns in which black candidates participated. He analyzed all judicial elections, even those in which only white candidates participated, beginning his analysis in 1976 with the first elections following the enactment of the Judicial Article. Of the 353 judicial elections analyzed

by Dr. Weber, 43 (12 percent) involved black candidates. Thirty of the 43 involved Oscar Adams.[18] Dr. Weber essentially found that in 76 percent of circuit judge elections and 77 percent of district court elections the candidate preferred by black voters won.[19] In statewide judicial elections, Dr. Weber concluded the candidate preferred by black voters won 83 percent of the elections.

C.

After weighing all of the evidence, the district court concluded that appellants had failed to satisfy the third prong of the *Gingles* test and thus to establish a violation of section 2. Specifically, appellants failed to show that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *SCLC v. Evans*, 785 F. Supp. at 1473. The court found that "for many years there has been no impediment to black voting in Alabama"; that "blacks and whites are registered in *comparable* percentages"; that "the black minority...has had increasing political impact in all political contests"; and that "blacks have been largely successful in having the candidate of their choice win in contested judicial elections." *Id.* at 1486-87. In the court's view, "[n]o one could find that election schemes in Alabama have reduced the minority vote to an empty formality or prevented minorities from substantially influencing election outcomes.... [T]he black

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[18] Because Justice Adams was involved in three electoral contests (1982 primary, 1982 primary runoff, and 1988 general election) and there are 10 circuits being challenged, Dr. Weber counted 30 of Justice Adams' races.

[19] Dr. Weber defined "black preferred candidate" or "black candidate of choice" as the candidate who received more than 50% of the black vote, without reference to the candidate's race.

electorate is decisive in 'influencing the outcome' of elections and having their preferred candidate elected. This is a great credit to the sagacity of the black political leadership in Alabama." *Id.* at 1487.

Turning to appellants' claim that the judicial circuit boundary lines had been drawn with the intent to dilute their voting strength, the district court observed that appellants "offered no evidence that the at-large voting system for electing judges was racially motivated." *Id.* at 1488 n.3.[20] On the evidence that was before it, the court found that "Alabama's procedure for electing judges at large (one hundred forty-two years) and for numbered places (sixty-five years)" and "the size of judicial circuits and districts were established with no racial discriminatory intent." *Id.* at 1487. In sum, the court found "no discriminatory purpose in the at-large voting system." *Id.* at 1488 n. 3.

The district court also concluded that the remedies appellants proposed are not feasible alternatives to the electoral systems now in place. The court advanced several reasons for its conclusion. For example, Alabama has "a legitimate state interest in having a judge's jurisdiction correspond to his constituency," *id.* at 1487; appellants' districting remedies would destroy this linkage and effectively disfranchise the voters residing beyond the judge's district. Appellants' influence in elections outside their district would diminish. " '[T]he great majority...of judges [would] be elected from new voting subdistricts with negligible minority populations and, consequently, negligible minority political influence on the outcome of those elections.' " *Id.* at 1479 (quoting *League of United Latin American Citizens Council v. Clements*, 914 F. 2d 620,

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[20] Moreover, in its amicus brief to the district court, the United States acknowledged "that the institution of the at-large, numbered place system was not driven by any desire to dilute black voting strength." *SCLC v. Evans*, 785 F. Supp. at 1487.

649-50 (5th Cir. 1990) (en banc)).

Appellants' proposals would eliminate the numbered place system and force judges to run against one another. In the court's view, "a worse system could not be imagined." *Id.* at 1490.

> [I]t is difficult...to conceive of a more inefficient and damaging way of electing judges than to have them all run in competition with each other.... There is a problem now of getting the best qualified lawyers to seek judgeships. This problem would be compounded if potential judicial candidates realized that at election time all judges would have as opponents their colleagues on the bench. Such a system would hardly tend to cause harmonious collegiality on the bench, and the heightened probability that one would have the costly task of running for reelection at the conclusion of each term would make seeking judicial office substantially less attractive.

Id. at 1477.

The district court's decision rejecting appellants' claims issued on March 18, 1992. A panel of this court subsequently vacated that decision and remanded the case for reconsideration in light of *Nipper v. Smith*, 1 F. 3d 1171 (11th Cir. 1993). After we took *Nipper* en banc, *Nipper v. Smith*, 17 F. 3d 1352 (11th Cir. 1994), we granted rehearing en banc and vacated the panel opinion in this care. *SCLC v. Evans*, 18 F. 3d 897 (11th Cir. 1994).

III.

Appellants contend that the district court's finding that the challenged electoral systems do not afford them less opportunity than other members of the electorate to participate in the political process and to elect candidates of choice is clearly erroneous. According to appel-

lants, the district court should have found to the contrary as a matter of law. Appellants also contend that the court erred in concluding that the remedies they proposed were unfeasible. Appellants, therefore, ask that we vacate the district court's judgment and remand the case for the imposition of the injunctive relief they are seeking. We consider these issues in turn.

A.

We review the district court's findings of fact under the clearly erroneous standard of Rule 52 (a) of the Federal Rules of Civil Procedure. *Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781. The only finding of fact appellants challenge in this appeal is the district court's finding on the ultimate factual issue: whether appellants' voting strength is being diluted on account of appellants' race. Appellants do not question any of the district court's findings on the subsidiary issues of historical fact.[21]

As noted *supra*, the district court, focusing on the third prong of the *Gingles* test, asked whether the voting patterns in the challenged jurisdictions reflected "polarized voting so that minorities have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *SCLC v. Evans*, 785 F. Supp. at 1472-73. Specifically, the court asked whether whites and blacks voted for a judicial candidate on account of the candidate's race or for some other reason, such as the candidate's qualifications, political affiliation, or whether the candidate had received any endorsements. In considering the evidence on this issue and the relative weight it should be given, the district court undertook the requisite practical, searching inquiry

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[21] Appellants, however, do question the district court's treatment of the expert testimony. *See infra* pp. 22-25.

required in section 2 cases. *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2764. The court approximately considered all of the circumstantial evidence—both statistical and anecdotal—that was offered.

We begin our assessment of the district court's finding on the ultimate issue by noting that there was no evidence that the at-large, majority vote, and numbered place requirements were instituted or are being maintained for discriminatory purposes, to dilute the appellants' voting strength on account of race. In addition, there was no evidence that the size of the judicial districts and circuits were established or are being maintained with such discriminatory intent. The appellants, therefore, have been basing their case for injunctive relief on the contention that, unless the challenged electoral systems are changed, vote dilution, given past voting patterns, will likely occur in the future.

Appellants contend that the district court's finding on the ultimate factual issue must be set aside because the court erred in its treatment of Dr. Lichtman's testimony. In its dispositive memorandum opinion, the court found Dr. Lichtman's analysis to be flawed. *SCLC v. Evans*, 785 F. Supp. at 1474-75. Dr. Lichtman's analysis was flawed because he only analyzed elections (both judicial and nonjudicial) involving a black candidate; moreover, he failed to appropriately consider the effect on judicial election results of the power of incumbency and, with respect to incumbents who had been appointed to office, the prestige of merit selection.[22] *Id.*

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[22] Incumbency is often the determining factor in judicial elections and, therefore, is an important factor to be considered in vote dilution cases in the judicial context. Likewise, the effect of the appointment process, especially where nominating commissions were involved, should not be undervalued: Over two-thirds of the sitting circuit judges (72 of 106) who came to the challenged circuit courts between 1978 and 1991 were appointed.

The district court correctly acknowledged this analytical omission: Lumping together all elections, judicial and nonjudicial alike, creates a risk of glossing over the significant differences between the legislative and judicial arenas. This is not to say that the approach of the appellees' expert, which only included judicial elections, was more appropriate. The district court also perceived flaws in Dr. Weber's analysis. Dr Weber's analysis omits many nonjudicial electoral races in which black candidates participated; such races are certainly relevant to the inquiry the district court was conducting.

Although it was urged to do so by the respective experts, the court refused to ignore relevant evidence. In the district court's view, any evidence that explained election results was relevant. That is, the court considered both nonjudicial and judicial elections, elections involving a black candidate, and elections in which no black candidate ran, all the while being mindful of the differences between these types of elections. The court also took into account the contextual materials offered. For example, the court reviewed evidence concerning, among other things, the extent of past official discrimination in Alabama, the lingering socioeconomic effects of that discrimination, and the extent to which the black community has been able to organize into an influential and successful political force. The court made clear that it discounted what were, in effect, arguments offered by the experts, albeit in the form of "opinions," as to how the court should resolve the ultimate fact to be decided in the case: whether the voting strength of minority voters is being diluted on account of their race.[23] Although the court may have rejected these "opinions," as it was permitted to do, the court emphasized that it was not ignoring any of the relevant, circumstantial evidence—both

testimonial and documentary—presented. The court concluded that "greater weight should be given to judicial elections...and white on black judicial elections, but [that it would]also consider political races generally—white on black and white on white—in seeking to determine the question of whether the political process is open to minority voters." *Id.* at 1473 (citations omitted)

In sum, the district court engaged in a searching and meaningful evaluation of *all* the relevant evidence concerning the challenged trial court jurisdictions. As the court's dispositive memorandum opinion details, there was ample evidence in the record to support the court's conclusion that factors other than race, such as party politics and availability of qualified candidates, were driving the election results and that racially polarized voting did not leave minorities with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* We find no cause to set aside the district court's finding on the ultimate issue of fact in this case. Appellants' claim under section 2 of the Voting Rights Act therefore fails.

B.

We read as an alternative holding the district court's discussion of the appropriateness and feasibility of appellants' proposed remedies. We agree with the court's con-

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[23] We refer to the experts' opinions as arguments because that is, in essence, what they were. The experts based their opinions on undisputed statistical evidence of demographics and voting results contained in the record. The experts presented no evidence of their own; they presented only their mathematical analysis of the portions of the statistical evidence they thought to be relevant. The experts applied their ecological regression and extreme case analysis to that evidence and opined as to whether voting has been racially polarized. Their conclusions differed because of the differences in the statistical evidence they chose to evaluate.

clusion that, assuming that appellants' opportunity to participate in the challenged elections was being abridged, no remedy is available in this case. When determining whether the remedy a plaintiff seeks is a feasible alternative to the challenged electoral system, a state's interest in maintaining the challenged system is a legitimate factor to be considered. *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 380, 426-27, 111 S. Ct. 2376, 2381, 115 L. Ed. 2d 379 (1991) (citing *Zimmer v. McKeithen*, 485 F. 2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 96 S. Ct. 1083, 47 L. Ed. 2d 296 (1976)). The challenged system fosters several legitimate state policies; two of them in particular appear to dominate the analysis: (1) maintaining the link between a trial judge's jurisdiction and elective base; and (2) ensuring that a pool of potential judicial candidates is large enough to give the voters a reasonable choice. Accordingly, we address each of appellants' proposed remedies in light of the policies that the state's interests advance.

1.

The first remedial option suggested by appellants is a reconfiguration of certain circuits. as we note *supra*, appellants presented no evidence indicating that the current circuit configuration was racially inspired. Under the proposed plan, five counties would be shifted into alternative circuits as follows:

REAPPORTIONMENT PLAN: CURRENT CIRCUIT DATA

Current Circuits	Total Pop.	Black Pop.	% Black	% Black VAP
Second	21,892	8,798	40	35
Butler	13,635	3,544	26	24
Crenshaw	12,658	9,456	75	70
Lowndes	48,185	21,798	45	40
Third	25,417	11,194	44	40
Barbour	11,042	7,986	72	67
Bullock	36,459	19,180	53	48
Fourth	16,576	3,478	21	18
Bibb	48,130	27,825	58	53
Dallas	15,498	9,214	59	55
Hale	12,759	8,219	64	57
Perry	13,568	9,353	69	63
Wilcox	106,531	58,089	55	49
Fifth	36,876	13,221	36	32
Chambers	24,928	21,340	86	84
Macon	19,881	4,686	24	21
Randolph	38,826	10,212	26	23
Tallapoosa	120,511	49,459	41	38
Thirty-fifth	14,054	5,925	42	38
Conecuh	23,968	9,372	39	35
Monroe	38,022	15,297	40	36
Third	25,417	11,194	44	40
Barbour	11,042	7,986	72	67
Bullock	24,928	21,340	86	84
Macon	61,387	40,520	66	63

Current Circuits	Total Pop.	Black Pop.	% Black	% Black VAP
Fourth	48,130	27,825	58	53
Dallas	15,498	9,214	59	55
Hale	12,759	8,219	64	57
Perry	76,387	45,258	59	54
Thirty-Fifth	12,658	9,456	75	70
Lowndes	23,968	9,372	39	35
Monroe	13,568	9,353	69	63
Wilcox	50,194	28,181	56	51

Caseload, population, population density, square miles per judge, attorneys per judge and other factors contribute to the allocation of judicial resources. Therefore, the reallocation of counties among circuits would have ramifications across the state. For example, Bibb County, which is currently one of five counties in the Fourth Circuit, would become a single county circuit. Whether a county of 16,576 could reasonably and efficiently support its own circuit is uncertain.

Bibb County also exemplifies the disfranchisement that would occur under the proposed reconfiguration: In the majority white circuits, the voting power of blacks would be diluted to a degree greater than the dilution alleged to be presently existing; in the majority black circuits, the voting power of whites would be diluted. Although currently the overall percentage of the black population of Bibb County is 21 percent, with a black voting age population of 18 percent; the black population of the Fourth Circuit in its entirety is 55 percent, with a black voting age population of 49 percent. Recircuiting would drastically dilute the vote of the

black voters in Bibb County in circuit judge elections—from 49 percent of the voting age population to 18 percent.

There was no evidence that justice in the challenged courts is being administered in a racially discriminatory manner. The purpose to be served by reconfiguring the circuits, therefore, would be, for the most part, to assist in the election of black judges. But the effect of having black judges accountable primarily to the black section of the circuit, and white judges answerable to the white section of the circuit (as would happen in Bibb County, for example), would threaten the administration of justice—race would become the linchpin of the judicial system. Massive restructuring for the purpose of earmarking judgeships would undermine the existing public confidence in judges as fair and impartial decisionmakers.

Given the appellants' suggested plan, it is quite doubtful whether the goal of placing more black lawyers on the bench would be achieved. Two of the proposed majority black circuits would have 51 percent and 54 percent black voting age populations—the current Fourth Circuit has a 49 percent black voting age population. The few additional percentage points would not be enough to ensure the successful election of black judicial candidates.

Another serious obstacle to ensuring the election of black judicial candidates is the limited pool of eligible black lawyers. Under Alabama law, Ala. Const. amend. 328, § 6.07, judges must be licensed attorneys. This requirement limits the eligible pool of candidates in a way that candidates for other representative bodies are not so confined. Even with reconfiguration, there is no guarantee that a black lawyer from the small number of

those eligible would even seek to become a candidate. For example, the Fifth Circuit is currently composed of four counties and is allotted three circuit judges. In three of those four counties there is no black lawyer. In seven of the nineteen counties that comprise the challenged circuits, there are no black attorneys. Only the Tenth Circuit, Jefferson County, has more than one hundred black lawyers, with 105. The Fifteenth Circuit, Montgomery County, has 56, and no other circuit has more than 20. Of more than 9600 licensed lawyers in Alabama, only 295 are black. Approximately one-third of all of the black attorneys who have ever been licensed in Alabama were granted licenses in the past five years. Most judges practice law for several years before seeking a position on the bench; this experience time-lag also must be factored in when calculating the available pool of black potential candidates. The State's interest in having a pool of black lawyers large enough to give the voters a reasonable choice from which to select a qualified candidate must be considered when evaluating suggested remedies.

For the foregoing reasons, the district court did not err in rejecting appellants' first remedial option.

2.

The second remedial option calls for carving the circuits and counties into districts—"either single-member districts or multi-member subdistricts with numbered places."[24] Appellants proposed that "[i]n Jefferson County, for example, two multi-member districts could be drawn—a majority black 'city division' from which a number of judges could run at-large for numbered places and a majority white 'county division' from which the

remaining judges could run in a similar fashion." Record, vol. 5, at 49, No. 143.

In addition to raising the same questions of the available pool of qualified black potential judicial candidates that we discussed, *supra*, in the context of circuit reconfiguration, subdistricting would directly implicate the State's linkage interest. Linking a trial court judge's territorial jurisdiction and electoral base serves to preserve judicial accountability. The Alabama model reflects a belief that voters should have the right to hold a judge accountable for his or her performance. Subdistricting, however, would strip every voter residing beyond a

[24] Appellants make it clear on appeal that they have not advocated any remedy that would lead to judges having to run against each other, such as would be the case with cumulative voting. They recognize the invidious effects that such a system would have on the collegiality of the court as well as on lawyer interest in a judicial career. Accordingly, in proposing multimember subdistricts, appellants would have the judges run for numbered places on the ballot and thus avoid the prospect of running against one another.

In passing, appellants, in their reply briefs, suggest as a possible remedy the creation of court-ordered judicial nominating commissions in jurisdictions not currently employing them, as well as increased minority representation on the commissions. This is a dubious suggestion given that appellants have alleged discriminatory practices on the part of the currently operating judicial nominating commissions: If the commissions are doing such a poor job, it is difficult to conclude that expanding their use would be beneficial. We note, additionally, that it is an open issue as to whether this type of remedy is permissible under the Voting Rights Act. The Act guarantees the right to *elect* representatives of choice. Judicial nominating commissions and the appointment process in general remove any choice from the voters—the initial choosing of "representatives" is no longer done by means of electoral voting procedures. Likewise, removing the power to elect judges from the citizens of Alabama would trample the longstanding value the State places on electing all of its public officials, even those officials other states have long since appointed. Today, however, we do not decide whether such a remedy is within the ambit of the Act.

judge's subdistrict of his or her participation in the judicial selection process—leaving the judge accountable only to those voters in his or her subdistrict. Even in the judge's own subdistrict, voters would be disfranchised: In white subdistricts the voting power of blacks would be diluted; in black subdistricts the voting power of whites would be diluted. The likely effects of the loss of minority influence would be more pronounced in this context of a lone decisionmaker, a trial judge, who would lack input from the colleagues elected by the rest of the citizenry of the jurisdiction.[25]

In linking the size of judicial electoral units and the trial court's territorial jurisdiction, Alabama has attempted to balance the desire for accountability of judges to their electorate along with the need to maintain judicial independence. Breaking this link would undermine the Alabama system of fostering an independent judiciary by holding judges accountable to a broad section of the population. Although utilizing partisan politics may inject a degree of "responsiveness" into the dynamic, any districting remedy that would further minimize the electoral base would encourage even greater "responsiveness" on the part of judges to the special interests of the people who elected them. It has been written that remedial plans in the legislative context may "reinforce [ ] racial stereotypes and threaten [ ] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw v. Reno*, —— U.S.

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[25] We understand, however, that the Voting Rights Act guarantees voters the right to *elect* candidates of their choice, not merely the right to *influence* election results. *See Solomon v. Liberty County*, 865 F. 2d 1566, 1583 (11th Cir. 1988) ("Today, the goal of section 2 is not to maximize the political clout of minorities, but rather to ensure minority representation in government.") *vacated and reh'g en banc granted*, 873 F. 2d 248 (11th Cir. 1989).

——, ——, 113 S. Ct. 2816, 2828, 125 L. Ed. 2d 511 (1993). This proposition seems quite accurate in the context of state trial court judges who must not engage in traditional legislative "responsiveness."

subdistricting would also increase the specter of "home cooking": Creating a smaller electorate would increase the pressure to favor constituents. Everyone agrees that in some politically volatile and controversial cases it is beneficial to have the electorate come from the entire circuit rather than some smaller portion. Appellants suggest that the judicial ethical code and the appellate process provide sufficient safeguards against favoritism concerns. But once court-ordered subdistricting sends the message, as it inevitably would, that race matters in the administration of justice, no procedure could mitigate the devastating effects. If favoritism concerns were rooted in racial issues, the fundamental fairness of the judicial system would continually be questioned. Such a redistricting remedy would reintroduce, to a greater degree, the very vices from which the appellants seek relief.

The district court did not err in rejecting appellants' second remedial option.

In sum, the many state policy interests we have discussed, including maintaining the link between a trial judge's electoral base and jurisdiction and ensuring a reasonable pool of qualified potential candidates, preclude the remedies appellants' propose; moreover these interests outweigh whatever possible vote dilution may have been shown in this case. The judgment of the district court is, therefore, AFFIRMED.

IT IS SO ORDERED.

EDMONDSON, Circuit Judge, concurring:

I am convinced that today's result is right legally. But, much of what is said in today's court opinion seems unnecessary to decide this case and may hide the main point. The main point here is the same idea that I, in my concurring opinion, stressed as the holding in *Nipper v. Smith*, 39 F. 3d 1494 (11th Cir.) (en banc), *cert. denied*, 115 S. Ct. ____ (1995): "each of the remedies discussed is precluded given the State's interest in and right to formulate its own judicial system." *Id.* at 1547 (Edmondson, J. concurring).

Let me say briefly the way I understand the law. The Voting Rights Act covers judicial elections. But, Alabama as a matter of law has the right — a right is an extremely weighty interest — to structure its judicial branch pretty much as Alabama thinks best. That structure now (and for a considerable time) involves at-large elections of trial judges from the jurisdictions they serve. This approach is neither irrational nor, in this country, rare. And, no evidence in this case shows that either the structure of the judicial system as a whole or specific judicial boundaries were drawn up to discriminate against any Alabama citizen on account of race. None of the judicial districts are unusual or strange. *Cf. Gomillion v. Lightfoot*, 81 S. Ct. 126, 127 (1960) (involving "uncouth" election district); *noted in, Houston Lawyers' Ass'n v. Attorney General*, 111 S. Ct. 2376, 2381 (1991). These few facts have great legal force. With a single stroke, they strike, in favor of Alabama, the balance of the circumstances. For me, they end this matter, sweeping the field and beating down the notion that a federal court might correctly impose some kind of restructuring "remedy" in this case.

These facts, as I understand the law, also allow us to

keep clear of certain lines of investigation in cases such as this one. No need exists to look at winners and losers of past elections or to speculate about why particular judicial candidates won and others lost. Most important, no need (and I think no rightful, federal judicial power) exists to compare the strength and weaknesses — as a matter of political science — of Alabama's current system of electing trial judges with the system for which plaintiffs contend. Even if in a head-to-head comparison plaintiffs' proposed system were "better" (that is, the wiser choice — in terms of good government or political science practice and theory) than Alabama's present system, federal courts could not properly compel Alabama to change, given the circumstances of this case.

The basic structure of Alabama's judicial branch of government, including the shape of its judicial jurisdictions and the manner of selecting trial judges, is in the hands of Alabama's people. And, no evidence in this case shows that, in Alabama today, black people or anyone else is obstructed on account of race from voting or otherwise working politically, to change the structure.

HATCHETT, Circuit Judge, dissenting:

Alabama has had a long and painful history of discriminating against its black citizens. In the area of voting rights, this discrimination has persisted despite constitutional amendments, Supreme Court decisions, and federal legislation. In the latest chapter of this history, black voters have turned to the Voting Rights Act (the Act) in an attempt to overcome Alabama's sad legacy. Fortunately, the Act has proved to be an invaluable tool in securing greater political representation for black Alabamans. Of course, the Act is not self-executing; federal courts have repeatedly fashioned relief in response to Alabama's violations of the law. In so doing, these courts have created an enormous body of case law, which includes extensive discussion of vote dilution claims under section 2 of the Act. When viewed against the backdrop of this precedent, the majority's opinion in this case stands as an anomaly in two respects.

First, federal courts have consistently declared that racially polarized voting has been, and remains, a fact of life in Alabama.[1] Indeed, when considering vote dilution claims in Alabama, federal courts have *always*

[1] *See, e.g.*, United States v. Dallas County Comm'n, 850 F. 2d 1433, 1440 (11th Cir. 1988) ("evidence reveals [ ] a distinct pattern of racially polarized voting" in Dallas County), *cert. denied*, 490 U.S. 1030 (1989); United States v. Marengo County Comm'n, 731 F. 2d 1546, 1567 (11th Cir.) (finding existence of racial bloc voting and stating "[r]ace is, as it has been since blacks were allowed to vote, the main issue in Marengo County politics"), *cert. denied*, 469 U.S. 976 (1984); Hendrix v. Joseph, 559 F. 2d 1265, 1270 (5th cir. 1977) ("[v]oting in Montgomery County is polarized along racial lines..."); Nevett v. Sides, 533 F. 2d 1361, 1369 (5th Cir. 1976) ("There is clear evidence that there is a polarization of votes by those who do vote in the City of Fairfield on city elections."); Dillard v. Town of Louisville, 730 F. Supp. 1546, 1549 (M.D. Ala. 1990) (finding "sub-

found racially polarized voting. Such findings are consistent with the Justice Department's determination that "racially polarized voting is present at all levels of elections in Alabama, *including judicial elections*...." *White v. State of Alabama*, 867 F. Supp. 1519, 1552-53 (M.D. Ala. 1994) (section 2 challenge to method of electing appellate judges in Alabama) (emphasis added). In this case involving trial judges, however, the majority holds that the appellants have failed to show racial bloc voting. In reaching this amazing result, a first in the history of Alabama voting rights jurisprudence, the majority has ignored the record in this case, this court's precedent, political reality, the history of the state, and what is obvious.

Second, federal courts have dutifully met the obligation under section 2 to impose remedial schemes on a

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stantial racially polarized voting" in the town of Louisville); Dillard v. Town of Cuba, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988) ("substantial racially polarized voting" in the towns of Cuba and Waldo); Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870, 874 (M.D. Ala. 1988) ("racially polarized voting in Chilton County"), *aff'd*, 868 F.2d 1274 (11th Cir. 1989); Dillard v. Baldwin County Comm'n, 694 F. Supp. 836, 842 (M.D. Ala.) ("[T] here is extensive racial polarization in [Baldwin] County."), *amended*, 701 F. Supp. 808 (M.D. Ala.), *aff'd*, 862 F. 2d 878 (11th Cir. 1988); Dillard v. Crenshaw County, 649 F. Supp. 289, 295 (M.D. Ala. 1986) ("[T]he evidence reflects that racially polarized voting in Calhoun, Lawrence, and Pickens Counties is severe and persistent...."), *remanded on other grounds*, 831 F. 2d 246 (11th Cir. 1987); Buskey v. Oliver, 565 F. Supp. 1473, 1482 (M.D. Ala. 1983) (racially polarized voting in the city of Montgomery); Brown v. Board of School Comm'rs of Mobile County, Ala., 542 F. Supp. 1078, 1094 (S.D. Ala. 1982) ("whites vote as a bloc against any black candidate" in Mobile County), aff'd, 706 F. 2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983). Hale County, Ala. v. United States, 496 F. Supp. 1206, 1212 (D.D.C. 1980) (whites engage in racial bloc voting in Hale County).

wide variety of governmental entities.[2] The majority, however, has suddenly abandoned this paramount obligation, effectively holding that its colleagues in Alabama's judiciary, unlike officials in the state's other branches of government, are immune from the remedial powers of the federal courts. Again, in arriving at this aberrational result, the majority has ignored the record in this case, this court's precedent, and political reality.

Because the majority has relied on its own view, rather than rigorously applying this court's precedent, in reaching its result, I find it necessary to outline the controlling law. Moreover, because the majority has not done so, I find it necessary to engage in the required circuit-by-circuit analysis of the facts of this case. After applying the law of this court to these facts, I can only conclude that the appellants have demonstrated a section 2 violation, for which a remedy can, and must, be employed. Accordingly, I respectfully dissent.

In discussing the issues, I will follow the outline listed below.

I. The Supreme Court's *Gingles*/Totality-of-the-Circumstances Test
II. The Law of this Circuit
    A. The *Gingles* Prong
        1. The First Two Factors: The Possibility of a Remedy
        2. The Third Factor: Racial Bloc Voting
    B. The Totality-of-the-Circumstances Prong

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[2] *See, e.g.*, Presley v. Etowah County Comm'n, 869 F. Supp. 1555 (M.D. Ala. 1994) (county commission); Dillard v. City of Greensboro, 865 F. Supp. 773 (M.D. Ala. 1994) (city council); Harris v. Siegelman, 700 F. supp. 1083 (M.D. Ala. 1988) (state poll officials); United States v. Marengo County Comm'n, 643 F. Supp. 232 (S.D. Ala. 1986) (county board of education), *aff'd*, 811 F. 2d 610 (11th Cir. 1987); Bolden v. City of Mobile, Ala., 542 F. Supp. 1050 (S.D. Ala. 1982) (city commissioners).

III. Application of the Law to the Facts of this Case
A. Applying the Third *Gingles* Factor
1. The Fourth Circuit
2. The Fifth Circuit
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C. Applying the Totality-of-the-Circumstances Prong
1. Extent Blacks Have Been Elected to Public Office
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5. Racial Appeals in Political Campaigns
6. Alabama's Tenuous Interests (Revisited)
IV. Conclusion

I. The Supreme Court's *Gingles*/ Totality-of-the-Circumstances Test

The focus of the section 2 inquiry is whether a "State or political subdivision" has imposed a "standard, prac-

tice, or procedure" that provides minority voters with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. It is clear that minority voters can bring a section 2 challenge through a claim of vote dilution. *See, e.g., Voinovich v. Quilter*, 113 S. Ct. 1149, 1155 (1993). Despite this clear law, Judge Edmondson, in his concurrence, suggests that minority voters cannot bring a section 2 challenge through a claim of vote dilution in the judicial election context. If this is in fact Judge Edmondson's suggestion, it is incorrect. For sure, minority voters can bring a section 2 challenge to judicial elections through a claim of vote dilution. *See Chisom v. Roemer*, 501 U.S. 380 (1991) (vote dilution challenge to judicial elections).

The Supreme Court has also made it abundantly clear that minority voters have the burden of satisfying three prerequisites in order to show vote dilution.

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed, — usually to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986) (citations omitted). The Supreme Court has recently stated that while these three factors are often conclusive, they do not "necessarily and in all circumstances demonstrate [vote] dilution." *Johnson v. De Grandy*, 114 S. Ct. 2647, 2657 (1994).

Instead, "courts must also examine other evidence in

the totality of the circumstances" before finding a violation of section 2. *De Grandy*, 114 S. Ct. at 2657. These other circumstances include: (1) the history of voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices that may enhance the opportunity for discrimination against a minority group; (4) whether members of the minority group have been excluded from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health which hinder their ability to participate effectively in the political process; (6) whether overt or subtle racial appeals have been made in political campaigns; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction; (8) whether elected officials are unresponsive to the particularized needs of members of the minority group; and (9) whether the policy underlying the state or political subdivision's use of the contested practice or structure is tenuous. *See De Grandy*, 114 S. Ct. at 2656-57 n. 9.[3] "[T]he most important Senate Report factors...are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.' " *Gingles*, 478 U.S. at 48 n. 15 (quoting S. Rep. No.

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[3] Because these factors are derived from the Senate Report accompanying the 1982 amendments to section 2, they are known as the Senate Report factors.

[4] Since racially polarized voting is vital to a dilution claim, the Supreme Court, as explained earlier, has included this Senate

417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in*, 1982 U.S.C.C.A.N. 177, 206-08).[4]

Although the above framework is firmly established, the Supreme Court has not clearly delineated its application, particularly in the context of judicial elections. *See Chisom*, 501 U.S. at 390 (leaving open the question of what "must be proved to establish a violation" of section 2 in the judicial election context).

II. The Law of this Circuit

This is the third *en banc* case in which this court has grappled with the basic framework of the *Gingles*/totality-of-the-circumstances test. *See Nipper v. Smith*, 39 F. 3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 1795 (1995); *Solomon v. Liberty County, Fla.*, 899 F. 2d 1012 (11th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 1023 (1991). Although *Nipper* and *Solomon* spawned seven conflicting opinions, a majority of this court agreed upon a limited set of holdings in both cases. With respect to the *Gingles* prong, a majority of this court has: (1) supplemented the first two factors in the judicial election context; and (2) clarified how to weigh expert statistical evidence when considering the third factor. *See Nipper*, 39 F. 3d at 1530-33, 1539-41; *Solomon*, 899 F.2d at 1020-21. With respect to the totality-of-the-circumstances prong, a majority of this court has added the state's interest in maintaining its system as a factor to consider in section 2 challenges to judicial elections. *See Nipper*, 39 F. 3d at 1528-30. This court, however, has yet to clarify the significance of the state's interests in relation to the Senate Report factors.

Report factor as one of the three required preconditions. *See Gingles*, 478 U.S. at 48-49. Thus, the extent to which members of the minority group have been elected to public office stands as the most important Senate Report factor to consider under the totality-of-the-circumstances prong.

A. The *Gingles* Prong

Although the *Gingles* prong contemplates three factors, this court has transformed it into a two-part inquiry when considering section 2 challenges to judicial elections. In so doing, this court explained that the "three factors are used to evaluate two critical points: (1) the possibility of a remedy and (2) the existence of racially polarized, legally significant racial bloc voting." *Nipper*, 39 F. 3d at 1530.

1. The First Two Factors: The Possibility of a Remedy

In *Nipper*, the leading opinion carried a majority in part III (B) (1). That majority held that in addition to requiring the plaintiff to show numerousness/compactness and cohesiveness, "[t]he first *Gingles* precondition, informed by the second, dictates that the issue of remedy is part of the plaintiff's prima facie case in section 2 vote dilution cases." *Nipper*, 39 F. 3d at 1530. Thus, a plaintiff can only satisfy the first two factors of the *Gingles* threshold inquiry if a court finds that "within the state's judicial model, there exists an alternative election scheme that could serve as an appropriate section 2 remedy." *Nipper*, 39 F. 3d at 1531.[5]

In my dissent in *Nipper*, I did not think it was appropriate to articulate fully my disagreement with the holding in part III (B) (1) because the issue of remedy was not properly before the court. Since the majority has implemented the reasoning in that premature holding to decide this case, I now find it necessary to illustrate how part III (B) (1) distorted clear Supreme Court precedent.

Essentially, in part III (B) (1) of *Nipper*, a majority of this court subtly substituted the word "remedy" for the word "benchmark," and thereby altered the *Gingles* threshold inquiry. The Supreme Court has clearly stated

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[5] It should be emphasized that this formulation of the first two *Gingles* factors only applies to section 2 challenges involving *judicial* elections.

that the first two *Gingles* factors require a court to "find a reasonable alternative practice as a *benchmark* against which to measure the existing voting practice." *Holder v. Hall,* 114 S. Ct. 2581, 2585 (1994) (emphasis added). This construction of the first two factors stems from Justice O'Connor's concurrence in *Gingles,* in which she explained that " '[t]he phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.' " *Holder,* 114 S. Ct. at 2585-86 (quoting *Gingles,* 478 U.S. at 88 (O'Connor, J., concurring)).

Thus, the first two *Gingles* factors require the existence of a hypothetical "benchmark" for the purpose of measuring vote dilution; they do not require a "remedy," something completely different. Indeed, Justice O'Connor articulated the difference between the two in *Holder,* explaining that an "alternative benchmark is often self-evident. In a challenge to a multi-member at-large system, for example, a court may compare it to a system of multiple single-member districts.... *Though there may be disagreements about the precise appropriate alternative practice in these cases, there are at least some objectively determinable constraints on the dilution inquiry.*" *Holder,* 114 S. Ct. at 2589-90 (O'Connor, J., concurring) (citations omitted) (emphasis added). In other words, the first two preconditions merely contemplate an objective basis used to assess the vote dilution inquiry; they do not contemplate a "remedy," or the "precise appropriate alternative practice" that will ultimately be implemented.

In *Holder,* the Supreme Court held that the size of a governing authority is not susceptible to a section 2 vote dilution challenge because "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison." *Holder,* 114 S. Ct. at 2586.

Despite the contentions of a majority of this court, this holding does not inject the state's interests in potential remedies into the *Gingles* stage of the inquiry, for the Supreme Court was not concerned with the state's interest in maintaining the size of its governing body. Instead, the Supreme Court simply found that such claims cannot withstand the first two *Gingles* factors because they are "inherently standardless," even at the level of hypothetical abstraction. *Holder,* 114 S. Ct. at 2588. It is important to remember that the standard for comparison (i.e., benchmark) is purely hypothetical; therefore, the state's interests in the actual implementation of potential remedies are irrelevant.

In sum, a majority of this court has erroneously placed remedy as the threshold issue in the section 2 inquiry. This puts the cart before the horse, for remedy, usually the last consideration in litigation, is now the first factor that a court considers. Common sense dictates that courts should first determine whether a section 2 *violation* has occurred. When minority voters establish a violation, then the issue of remedy becomes ripe.

After saying all the above, I still recognize that the holding in part III (B) (1) of *Nipper,* no matter how incorrect I deem it to be, controls the application of the first two *Gingles* factors to the facts of this case. Accordingly, this is the standard that I will employ. Before I do so, however, two points must be clarified.

First, when considering the first two *Gingles* factors, the spectrum of possible remedies is not limited to the ones that the section 2 plaintiff proposes, for it is the court's responsibility to consider all permissible remedies. *See Nipper,* 39 F. 3d at 1531 (the "*district court* must determine as part of the *Gingles* threshold inquiry

whether it can fashion a permissible remedy") (emphasis added). It is ironic that, in the judicial election context, the section 2 plaintiff is now the party with the burden of proposing possible remedies for court approval. Typically, the burden is on the state to propose a remedial scheme that "conform[s] with Section 2" and satisfies the court. *Dillard v. Crenshaw County, Ala.*, 831 F. 2d 246, 249 (11th Cir. 1987). Under this traditional framework, although the state bears the burden of coming forward with potential alternatives, it is ultimately the "role of the district court to fashion a narrowly and well tailored remedy." *Dillard*, 831 F. 2d at 253. Likewise, although section 2 plaintiffs, as opposed to the state, are now required to offer a feasible alternative in the judicial election context, it is still the ultimate responsibility of the court to consider all potential remedies if it finds that the ones the plaintiffs offer do not suffice. It has always been Congress's intent that "[t]he *court* should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982), *reprinted in*, 1982 U.S.C.C.A.N. 177, 208 (emphasis added).

The second point that needs to be clarified is the standard for judging the feasibility of a remedy. In *Nipper*, the majority used several different phrases to describe the standard of feasibility: (1) "a permissible remedy in the particular context of the challenged system"; (2) "a remedy within the confines of the state's judicial model that does not undermine the administration of justice"; (3) "within the state's judicial model, there exists an alternative scheme that could serve as an

appropriate section 2 remedy"; and (4) "a workable remedy within the confines of the state's system of government." *Nipper*, 39 F. 3d at 1531-33. These phrases mean that although a remedy may not drastically alter the substance of the state's judicial model, it may alter the method used to select judges, for "[i]t has long been the rule that ... some alteration in the State's election system may be called for in order to remedy" a section 2 violation. Brief of the United States in Support of Petition for Certiorari at 15, *Nipper v. Smith*, 115 S. Ct. 1795 (1995) (No. 94-1463). Thus, a court may consider cumulative voting as a remedy to a numbered place system because that alternative only alters the method of selecting judges. Similarly, a court may consider subdistricting as a remedy to an at-large system because that alternative only bears on the method of selecting judges. A court may also change the geographical makeup of a circuit system so as to alter the electoral bodies that vote for judges. This alternative, which primarily changes the method of selecting judges, does not fundamentally alter the state's judicial model; in fact, this type of modification is routinely made to reflect shifts in caseload and population.[6] Finally, these phrases also indicate that a potential remedy need not be the state's favored option. Likewise, the proposed remedy need not employ the system that the court believes to be the best or most efficient. Instead, the proposed remedy must simply be "workable." *Nipper*, 39 F. 3d at 1533 (quoting *Holder*, 114 S. Ct. at 2586). Stated differently, the remedy is feasible as long as it "does not undermine the administration of justice." *Nipper*, 39 F. 3d at 1531.

2. The Third Factor: Racial Bloc Voting

In vote dilution cases, courts must often decide the

[6] For example, in 1990, Alabama altered the geographical composition of the Fortieth Circuit.

third *Gingles* factor, whether majority bloc voting usually defeats minority candidates, on the basis of statistical evidence. This court has constructed two guiding principles for courts to employ when weighing such evidence.

First, this court has explained that the statistical "evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates." *Nipper*, 39 F. 3d at 1539 (quoting *Westwego Citizens for Better Government v. Westwego*, 872 F. 2d 1201, 1208 n. 7 (5th Cir. 1989)).[7] Indeed, elections involving only white candidates "reveal little about the issue to be determined: the capacity for white bloc voting usually to defeat black candidates of choice." *Nipper*, 39 F. 3d at 1540. Thus, elections involving white candidates are only probative "[w]here black voters have a genuine candidate of choice"; they are not probative when "the candidate of choice of black voters was also the preferred candidate of the white voters." *Nipper*, 39 F. 3d at 1540-41. Furthermore, a court cannot assume, "based only on a cursory examination[,]" that because the majority of black voters supported a white candidate, that candidate was a "genuine candidate of choice." *Nipper*, 39 F. 3d at 1540. Instead, in order to be a genuine candidate of choice, a court must find some support, such as "anecdotal testimonial evidence, polling data, a review of the appeals made during the campaign, [or] turnout information, indicating [that] black voters were energized to support a particular white candidate." *Nipper*, 39 F. 3d at 1540. In sum, biracial elections typi-

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[7] In *Nipper*, the entire court found that the section 2 plaintiffs had satisfied the third *Gingles* factor. The discussion of the third factor is located in part IV of Chief Judge Tjoflat's leading opinion, in which Judge Anderson joined. In my dissent, in which Judge Kravitch joined, I did not disagree with the Chief Judge's analysis of the third *Gingles* factor, and specifically noted that the court had found "that a vote dilution occurred." *Nipper*, 39 F. 3d at 1547 (Hatchett, J., dissenting).

cally will be most probative, and since the inquiry is whether white bloc voting works to defeat black candidates, the most important statistic is the white crossover vote in biracial elections.

As a second guiding principle, this court has announced when this most probative statistical evidence satisfies the third *Gingles* factor as a matter of law. Specifically, statistical evidence showing that no black candidate has ever been elected, coupled with an average white crossover vote of twenty-one percent, is "sufficient as a matter of law to establish that white voting...is racially polarized to the extent that blacks are unable to elect the candidates of their choice." *Solomon*, 899 F. 2d at 1021 (Kravitch, J., specially concurring).[8] It is important to note that racial bloc voting often exists when the average white crossover vote is greater than

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[8] Although this holding appears in Judge Kravitch's special concurrence, all ten judges of the *en banc* court agreed that racially polarized voting had been established as a matter of law. *See Nipper*, 39 F. 3d at 1537 (noting that the entire court agreed with this portion of Judge Kravitch's special concurrence).

In *Solomon*, black candidates had lost six elections for county office. The determinative factor, however, was not that black candidates had lost *six* elections, but that they had never won *one*. Indeed, the fact that a minority candidate has never run for the particular office at issue "does not foreclose a vote dilution claim." *Gingles*, 478 U.S. at 57 n. 25. "To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *Westwego*, 872 F. 2d at 1209 n.9; *see also* McMillan v. Escambia County, 748 F. 2. 1037, 1045 (5th Cir. 1984) ("the lack of black candidates is a likely result of a racially discriminatory system"). Thus, "[w]here a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process." *Gingles*, 478 U.S. at 57 n. 25. As the preceding paragraph in the text illustrates, these other factors primarily include the white crossover vote in elections for any office in which both a black and white candidate competed.

twenty-one percent. Indeed, in *Gingles*, the Supreme Court found racial bloc voting where "white support for black candidates ranged between 8% and 50%, and...between 28% and 49%." *Gingles*, 478 U.S. at 59 (emphasis added). Thus, an average white crossover vote greater than twenty-one percent, coupled with other factors, including the fact that no black candidate has ever been elected to office, can constitute racially polarized voting.

B. The Totality-of-the-Circumstances Prong

In *Nipper*, a majority of this court adopted dicta from Justice Stevens's opinion in *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 426-27 (1991), which stated that the state's interest in maintaining its judicial system is a legitimate factor to consider under the totality of the circumstances. *See Nipper*, 39 F. 3d at 1529 (in part III (A) of the leading opinion, which carried a majority). Thus, in addition to the Senate Report factors, this court also considers the state's interests when analyzing the totality-of-the-circumstances prong in section 2 challenges to judicial elections.

Exactly what weight a court should place on the state's interests is unclear. The purpose of the totality-of-the-circumstances prong is to aid in the overall determination of whether section 2 plaintiffs have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (b). Unlike the Senate Report factors, the state's interests are, for the most part, irrelevant to this inquiry; thus, they should carry minimal weight in the totality-of-the-circumstances analysis. Furthermore, this court already considers the state's interests in maintaining its judicial system during the remedy phase of the *Gingles*

prong; thus, it is pointless and repetitive to give the state's interest great weight at this stage.

III. Application of the Law to the Facts of this Case

Although *Nipper* injected remedy into the first and second *Gingles* factors, thereby making it the threshold issue in challenges to judicial elections, the majority begins its analysis in this case with the third *Gingles* factor, racially polarized voting. For the sake of clarity, I will do the same. Unlike the majority, however, I will not defer, under the clearly erroneous standard, to the district court because it committed several legal errors in arriving at its findings. *See Gingles*, 478 U.S. at 79. Also, unlike the majority, I will undertake the required circuit-by-circuit analysis in reviewing the district court's racial bloc voting findings. *See Gingles*, 478 U.S. at 59 n. 28 (the "racially polarized voting" inquiry is "district-specific"). Indeed, the majority's failure to engage in the required circuit-by-circuit analysis is a serious flaw, for the district court's legal errors become obvious under this more particularized level of scrutiny.

After reviewing the district court's racial bloc voting determination, I will proceed to the first and second *Gingles* factors, which, under *Nipper*, contemplate the state's interest in potential remedies, and then to the totality-of-the-circumstances inquiry. Once again, I will not defer to the district court's findings because the issues of remedy and "the substantiality of [Alabama's] interest under § 2 [are] question[s] of law for this court to determine *de novo*." *League of United Latin American Citizens v. Clements*, 999 F. 2d 831, 871 (5th Cir. 1993) (*en banc*) (*LULAC*), *cert. denied*, 114 S. Ct. 878 (1994).

A. Applying the Third *Gingles* Factor

As will become apparent, the following circuit-by-

circuit analysis shows that the district court repeatedly engaged in the same egregious legal errors in its analysis of racial bloc voting. So as not to become too repetitive, I will first explain the legal errors that the district court committed, and then list, circuit-by-circuit, the facts that are relevant to those errors.

First, the district court ignored the evidence that black lawyers, faced with the prospect of almost certain defeat, had generally been deterred from running for judgeships. *See White*, 867 F. Supp. at 1553-54 ("[T]he evidence before the court suggests that because of the difficulty of running for [Alabama judgeships], qualified blacks do not seek election.... Potential judicial candidates who would be the most likely first choices of the black community are not running."). Instead, the district court emphasized that, in some circuits, black lawyers had never run for judgeships. This is an improper consideration as a matter of law. *See Gingles*, 478 U.S. at 57 n. 25; *Westwego*, 872 F. 2d at 1208-09; *White*, 867 F. Supp. at 1554. Then, in the absence of extensive data concerning biracial elections for circuit and district judgeships, the district court failed to look to the most probative statistics — the white crossover vote in biracial elections for other offices. *See Nipper*, 39 F. 3d at 1539. Rather, without determining whether one of the candidates was a genuine candidate of choice of the black voters, the district court improperly relied on statistical data concerning elections between white candidates. *See Nipper*, 39 F. 3d at 1540-41. In giving these elections great probative weight, the district court wrongly assumed, "based only on a cursory examination[,]" that because the majority of black voters

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[9] In focusing on these elections, the district court primarily relied on the analysis of the appellees' expert, Dr. Ronald Weber. The district court should have relied on the statistical evidence concerning the white crossover vote in biracial elections, which the appellants' expert, Dr. Allan Lichtman, provided. Ironically, both of these

supported a white candidate, that candidate was a genuine candidate of choice. *Nipper*, 39 F. 3d at 1540.[9]

Finally, and perhaps most importantly, the district court ignored this court's *en banc* decision in *Solomon*. In the ten challenged circuits, not one black candidate has attained a district or circuit judgeship through a contested election.[10] Moreover, the average white crossover vote in each circuit is lower than, or comparable to, the twenty-one percent average in *Solomon*. The combination of these two facts is sufficient as a matter of law to satisfy the third *Gingles* factor. *See Solomon*, 899 F. 2d at 1021 (Kravitch, J., specially concurring).

1. The Fourth Circuit

The Fourth Circuit has two circuit judges. Neither are black. Blacks, however, comprise forty-nine percent of the voting age population in the Fourth Circuit. The parties *stipulated* that at least until the 1980s, strong racially polarized voting existed in Hale and Dallas Counties, which are part of the Fourth Circuit.[11] Nonetheless, the district court, without even mentioning this evidence, determined that racially polarized voting does not exist in the circuit.

In so doing, the district court emphasized, improperly, that "[n]o black lawyer has ever chosen to run for circuit judge" in the Fourth Circuit. *Southern Christian Leadership Conference of Alabama v. Evans*, 785 F. Supp. 1469, 1480 (M.D. Ala. 1992) (*SCLC*). The district court also erroneously emphasized that "the candidate pre-

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experts also presented evidence in *Nipper*, where this court credited Dr. Lichtman's analysis.

[10] Some black candidates have won *re*-election contests after being appointed, but none has ever first attained office after winning a contested election.

[11] A copy of the parties' stipulation is attached as an appendix.

ferred by the circuit's black voters won in the circuit eighty-eight percent of the time," without determining whether those candidates were genuine candidates of choice. *SCLC*, 785 F. Supp. at 1480.

Finally, the district court failed to look at the most probative statistical evidence, the white crossover vote in biracial elections. Had the district court considered this evidence, it would have recognized that the appellants showed racial bloc voting as a matter of law because no black has ever been elected to the position of circuit judge, and the average white crossover vote in the Fourth Circuit is a mere fifteen percent.

2. The Fifth Circuit

The Fifth Circuit has three circuit judges. None are black. Blacks, however, comprise thirty-eight percent of the voting age population in the Fifth Circuit.

In determining that the appellants failed to show racially polarized voting, the district court erroneously emphasized that "[n]o black candidate has run for circuit judge" in the Fifth Circuit. *SCLC*, 785 F. Supp. at 1480. The district court also erred in emphasizing that "the candidate preferred by blacks in the circuit won eighty-five percent of the time," without determining whether those candidates were genuine candidates of choice. *SCLC*, 785 F. supp. at 1480.

Again, the district court failed to consider the most probative evidence, the white crossover vote in biracial elections. Had it done so, it would have recognized that the appellants established the third *Gingles* factor as a matter of law, for no black has ever been elected to the position of circuit judge, and the average white crossover vote in the Fifth Circuit is twenty-one percent.

3. The Sixth Circuit

The Sixth Circuit has three circuit judges. None are black. Blacks comprise twenty-three percent of the voting age population in the Sixth Circuit.

In determining that the appellants failed to satisfy the third *Gingles* factor, the district court erroneously emphasized that "[i]n the eight contested trial judge elections within the Sixth Circuit since 1976, none involved a black candidate." *SCLC*, 785 F. Supp. at 1481. The district court also erroneously emphasized that "[t]he candidate preferred by blacks in statewide judicial elections prevailed in the circuit twenty-one out of twenty-two times," but did not analyze whether those candidates were genuine candidates of choice. *SCLC*, 785 F. Supp. at 1481.

Once again, the district court ignored the most probative evidence and the *Solomon* standard. Racially polarized voting exists in the Sixth Circuit as a matter of law, for no black has ever been elected to sit on the Sixth Circuit, and the average white crossover vote is only twenty percent.

4. The Seventh Circuit

The Seventh Circuit has four circuit judges. None are black. Blacks comprise sixteen percent of the voting age population in the Seventh Circuit.

Once again, the district court, without determining whether genuine candidates of choice were involved, incorrectly emphasized that "[i]n five of eight circuit judge elections, the candidate preferred by black voters won.... In statewide judicial elections, the candidate preferred by black voters won in the circuit seventy-six percent of the time." *SCLC*, 785 F. Supp. at 1481.

Again, the district court ignored the most probative

evidence and the *Solomon* standard, for no black has ever been elected to sit on the Seventh Circuit, and the average white crossover vote is twenty-five percent. Indeed, a black candidate, Nathaniel Owens, has twice run for the circuit bench. He lost both times. In his 1978 loss, he won approximately sixty-seven percent of the black vote, but only sixteen percent of the white vote. In his 1982 loss, he won 100 percent of the black vote, and only approximately 19 percent of the white vote.

5. The Tenth Circuit

Appellants challenge the system for electing both circuit and district judges in the Tenth Circuit. Since the Tenth Circuit is a single-county circuit, the district and circuit court elections involve the same electorate. Thus, the two challenges can be considered simultaneously.

The Tenth Circuit has a black voting age population of thirty-two percent. But, only three of the twenty-four circuit judges in the Tenth Circuit are black; all were appointed.[12] Of the eleven district judges in the Tenth Circuit, none are black. Ralph Cook, one of the three black circuit judges in the Tenth Circuit, previously served as a district judge. Cook, who ran unopposed, was elected to the district court bench in 1976. This unopposed victory is the only instance where a black has achieved a judicial position through election in any of the ten challenged circuits.

In finding that the appellants failed to show racial bloc voting in the Tenth Circuit, the district court explained that "[i]n twenty-one of twenty-three (91 percent), contested circuit court elections, and in nine of eleven (82 percent) contested district court elections, the candidate preferred by black voters was elected.... In the twenty-six statewide judi-

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[12] One of the judges was appointed after the appellants filed this lawsuit.

cial elections since 1976, a candidate preferred by black voters has won on each occasion." *SCLC*, 785 F. Supp. at 1482. Thus, once again, the district court erroneously relied on elections between white candidates without determining whether one of those candidates was a genuine candidate of choice of the black voters.

Because Judge Cook's unopposed victory in 1976 does not count, no black has ever achieved a judicial position in the Tenth Circuit through election. *See Gingles*, 478 U.S. at 51 (unopposed victories do not count against a finding of racial bloc voting). In the two elections where black candidates ran against white candidates for district judgeships, the black candidates lost. In those two elections, the black candidates, Raymond Chambliss and Emory Anthony, received nearly 100 percent of the black vote, and only approximately 24 percent of the white vote. Moreover, the average white crossover vote in the Tenth Circuit is twenty-two percent. Thus, once again, the appellants have satisfied the third *Gingles* factor.

6. The Thirteenth Circuit

Appellants challenge the system for electing both circuit and district judges in the Thirteenth Circuit. Like the Tenth Circuit, the Thirteenth Circuit is a single-county circuit. Thus, the two challenges can be considered simultaneously.

The Thirteenth Circuit, which has a black voting age population of twenty-eight percent, is comprised of ten circuit judges; only one is black. Of the four district judges in the circuit, only one is black. Both black judges were appointed to the bench.

In finding no racial bloc voting, the district court analyzed elections between white candidates without determining whether one of the candidates was a genuine

candidate of choice of the black voters. The district court simply reasoned: "In the four circuit court elections, the candidate favored by black voters prevailed on each occasion. In district court elections...the black preferred candidate has won seventy-five percent of the time. In statewide elections, the Thirteenth Circuit vote has gone to the black preferred candidate eighty-five percent of the time." *SCLC*, 785 F. Supp. at 1483-84.

The district court also failed to consider the most probative evidence. The parties stipulated that at least until 1982, racially polarized voting occurred in the Thirteenth Circuit. The district court did not even mention this fact. Furthermore, no black has ever been elected to a circuit or district judgeship in the Thirteenth Circuit. In 1980, Frankie Fields Smith entered, and lost, the Democratic primary for a district judge position. Although she received almost ninety-five percent of the black vote, she only received approximately eight percent of the white vote. Smith ran again in 1986. Because she entered the race late, she did not run with the benefit of organized party support. Nonetheless, she received almost forty-five percent of the black vote, but less than one percent of the white vote. Had the district court considered the low crossover votes in Fields's elections, and the low average white crossover vote of twenty percent, it would have recognized that, under *Solomon*, the appellants established the third *Gingles* factor as a matter of law.

7. The Fifteenth Circuit

Appellants challenge the system for electing both circuit and district judges in the Fifteenth Circuit. Since the Fifteenth Circuit is a single-county circuit, the two challenges can be considered simultaneously.

Despite the Fifteenth Circuit's black voting age pop-

ulation of thirty-eight percent, only one of its seven circuit judges is black. None of its three district judges are black.

The parties stipulated that, in the Fifteenth Circuit, racially polarized voting existed at least until 1978. The district court ignored this highly probative evidence. Instead, the district court chose to emphasize irrelevant elections between white candidates, explaining: "In eight of the ten trial judge elections...the black preferred candidate prevailed....[S]tatewide judicial candidates preferred by blacks have won the county vote on twenty-two of twenty-six occasions." SCLC, 785 F. Supp. at 1484.

The district court also made the mistake of ignoring *Solomon*. No black has ever been elected to a district or circuit judgeship in the Fifteenth Circuit, and the average white crossover vote is twenty-two percent.

8. The Twentieth Circuit

The Twentieth Circuit has three circuit judges. None are black. Blacks comprise twenty-two percent of the voting age population in the Twentieth Circuit.

Of course, the district court incorrectly emphasized elections between white candidates, without undertaking the genuine candidate of choice inquiry, reasoning: "The circuit judge candidate preferred by blacks has been successful in two of the four contested elections since 1976, and the statewide judicial candidate favored by black voters has won the circuit vote seventeen of twenty-six times." *SCLC*, 785 F. Supp. at 1485.

The district court also failed to consider the most probative evidence and the *Solomon* standard. If it had done so, it would have recognized that the appellants satisfied the third *Gingles* factor as a matter of law. No

black has ever been elected to the circuit bench, and the average white crossover vote is only twenty percent.

9. The Twenty-Third Circuit

The Twenty-Third Circuit has six circuit judges. None are black. Blacks comprise nineteen percent of the voting age population.

The district court erroneously relied on elections between white candidates, explaining that "[i]n the few contested judicial elections within the Twenty-Third Circuit, the candidate preferred by black voters prevailed in three of the three circuit court elections and in four of the six district court elections. In statewide judicial elections, the county vote has gone with the candidate preferred by blacks sixty-five percent of the time." *SCLC*, 785 F. Supp. at 1485.

Once again, the district court ignored the most probative evidence and *Solomon*. No black has ever been elected to the circuit court bench, and the average white crossover vote in the Twenty-Third Circuit is twenty-two percent. Indeed, in perhaps the most relevant election, Al Beckles, a black candidate, unsuccessfully ran for the district bench in 1990. Although he received more than eighty percent of the black vote, he received *less than five percent* of the white vote.

10. The Twenty-Sixth Circuit

Appellants challenge the system for electing both circuit and district judges in the Twenty-Sixth Circuit. Like the other circuits where the appellants have made a challenge at both the circuit and district level, the Twenty-Sixth Circuit is a single-county circuit. Thus, the two challenges can be considered simultaneously.

The Twenty-Sixth Circuit has two circuit and two dis-

trict judges. None are black. Blacks, however, comprise thirty-six percent of the voting age population. No black has ever been elected to a district or circuit judgeship in the Twenty-Sixth Circuit. The average white crossover vote is a mere sixteen percent. Thus, under *Solomon*, the appellants established racially polarized voting as a matter of law in the Twenty-Sixth Circuit.

11. Summary

The following chart summarizes the relevant facts for each of the ten challenged circuits.[13]

Circuit	% of Black Voting Age Popula-tion	% of Average White Cross-over vote	Number of Judge-ships	Number of Appointed Black Judges	Number of Elected Black Judges
4th	49%	15%	2	0	0
5th	38%	21%	3	0	0
6th	23%	20%	3	0	0
7th	16%	25%	4	0	0
10th	32%	22%	35	3	0
13th	28%	20%	14	2	0
15th	38%	22%	10	1	0
20th	22%	20%	3	0	0
23rd	19%	22%	6	0	0
26th	36%	16%	4	0	0
Total	—	—	84	6	0

[13] The chart groups circuit and district judges in the Tenth, Thirteenth, Fifteenth, and Twenty-Sixth Circuits. For example, the Tenth Circuit has twenty-four circuit judges and eleven district judges. The chart simply lists the number of judgeships as thirty-five.

B. Applying the First and Second *Gingles* Factors

The first *Gingles* factor requires the appellants to show numerousness and compactness in the challenged circuits. Appellees "concede that such a showing has been made." *SCLC*, 785 F. Supp. at 1472.[14] The second *Gingles* factor requires a showing of political cohesiveness. The district court found that the appellants "have fully established a cohesion of the black vote." *SCLC*, 785 F. Supp. at 1472. The appellees do not challenge this finding.

The majority, however, holds that the appellants have failed to satisfy the first and second *Gingles* factors, as this court has formulated them in the judicial election context, because they have failed to propose a feasible remedy. Accordingly, I will address the majority's contentions, keeping in mind this court's duty to consider all possible alternatives. I conclude that the appellants have proposed two "workable" remedies that do not "undermine the administration of justice." I also believe that cumulative voting, which was not proposed, constitutes a "workable" alternative.

1. Reconfiguration of Circuits

The appellants have proposed realigning counties in the Fourth and Fifth Circuits with counties in neighboring circuits in order to create three majority black circuits. The majority holds that this remedy is not feasible because: (1) it fails to take into account factors that contribute to the allocation of judicial resources; (2) it would dilute black voting power in the counties that are not

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[14] Appellees, however, did contend, and the district court ultimately found, that the appellants had failed to satisfy the first *Gingles* factor in one circuit, the Seventh. Since the majority does not discuss this holding, I simply say that I disagree with the district court, and believe that the appellants have satisfied the first *Gingles* factor in the Seventh Circuit.

realigned into the majority black circuits; (3) it would make race the linchpin of the judicial system; (4) it would not ensure the success of a black candidate; and (5) the pool of black lawyers in the reconfigured circuits would be too small to give voters a reasonable choice of candidates. I will address each of these contentions in turn.

First, the majority explains that the proposed reconfiguration fails to take into account factors related to judicial resources, such as caseload and population. This contention is false. The three new circuits would have populations ranging from 50,194 to 76,387. The forty circuits in Alabama have a population range of 27,814 to 651,525, and many are in the range of the proposed circuits. Furthermore, the projected caseload for the proposed circuits would range from 1,070 to 1,596 cases filed per year.[15] The forty circuits in Alabama have a caseload range of 721 to 32,826 cases filed per year, and many of the circuits have caseloads similar to the proposed circuits. In short, when considering all aspects of judicial resources, the proposed reconfigured circuits would be quite ordinary. The majority also contends that the proposed reconfiguration would force Bibb County, with a population of 16,576, to become a single-county circuit. The Thirty-Fourth Circuit, however, is solely comprised of Franklin County, which only has a population of 27,814. More importantly, Bibb County could easily be realigned with a neighboring circuit, such as the Nineteenth Circuit. The majority's assertion that Bibb County would have to stand on its own is wrong.

The majority's next contention is that the vote of

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[15] These figures are based on the number of circuit court cases filed in the respective counties in 1990. This data is contained in the Alabama Judicial System Annual Report for the 1990 fiscal year (October 1, 1989, through September 30, 1990). This report is included in the record as defendant's exhibit 43.

blacks not included in the reconfigured circuits will be diluted. For example, although blacks only comprise eighteen percent of the voting age population in Bibb County, they are currently part of the Fourth Circuit, which has a black voting age population of forty-nine percent. Since the proposal plans to realign the Fourth Circuit into a majority black circuit, which does not include Bibb County, the black voters of Bibb County will no longer enjoy the status of being members of a large minority. Such reasoning, however, defeats the purpose of section 2, which is to provide minorities with the opportunity to elect candidates of their choice. *See* 42 U.S.C. § 1973 (b). Congress has decided that it is better to create districts where minorities can elect representatives of their choice, rather than to continue to allow them to influence elections as a mere swing vote. In redrawing districts, some minorities will always be excluded, but this is a policy decision that Congress has made, and courts must enforce. As Chief Judge Tjoflat has recognized, "the goal of section 2 is not to maximize the political clout of minorities, but rather to ensure minority representation in government.... [E]ven if such a policy actually reduces the overall political responsiveness to minority needs—the policy choice belongs to Congress." *Solomon v. Liberty County, Fla.*, 865 F. 2d 1566, 1583 (11th Cir. 1988), *vacated*, 873 F. 2d 248 (11th Cir. 1989) (*en banc*). Indeed, in footnote 25, the majority concedes that "the Voting Rights Act guarantees voters the right to *elect* candidates of their choice, not merely the right to *influence* election results[,]" thereby undermining its concerns about excluded black voters.

The majority's third contention is that the sole purpose of the reconfiguration is to assist in the election of black judges, and this would improperly thrust race into

the judicial process; as a result, the public would lose confidence in the impartiality of the system. The Supreme Court's decision in *Chisom*, 501 U.S. 380, has essentially foreclosed this argument. Put simply, *Chisom* holds that section 2 applies to judicial elections; this holding necessarily entails remedies that will purposefully assist in the election of black judges.

The majority's fourth problem with the reconfiguration remedy is that it will not ensure the success of black judicial candidates. The purpose of section 2, however, is to provide minorities with an *equal opportunity* to elect representatives of their choice; its purpose is not to ensure the success of minority candidates. In fact, the proposed reconfiguration will result in three circuits with black voting age populations of sixty-three percent, fifty-four percent, and fifty-one percent, thereby providing the *equal opportunity* that section 2 contemplates. Furthermore, the total percentage of black population in the three proposed circuits is even higher: sixty-six percent, fifty-nine percent, and fifty-six percent. Thus, blacks may enjoy a higher percentage of voting age population in the future. The majority seems to ignore the fact that the proposed remedy is prospective in nature.

Finally, the majority contends that because all judges in Alabama must be lawyers, the proposed circuits need a larger pool of black lawyers from which to select judges. One of the proposed circuits would have thirteen black lawyers out of a total of seventy-seven lawyers; another would have thirteen black lawyers out of a total of fifty-four lawyers; the third would have two black lawyers out of a total of thirty-four lawyers. When compared to the present number of lawyers in many jurisdictions in Alabama, the proposed circuits provide an ample number of lawyers from which to select judges.[16]

Indeed, nine circuits in Alabama elect their circuit judges from a pool of thirty-four lawyers or less. The statistics are even more revealing when one considers district court elections. Lowndes County presently elects its district judge from a pool of three lawyers. Several other counties in Alabama elect their district judges from a total pool of five lawyers. Almost twenty percent of the counties in Alabama elect their district judges from a pool of ten lawyers or less. Another forty percent of the counties elect their district judges from a pool of twenty lawyers or less. Alabama's judicial system is able to operate in these districts and circuits, and the proposed circuits should be able to do the same. Put simply, after considering these facts, the two proposed circuits with thirteen black lawyers provide the voters with a sufficient pool of black lawyers from which to choose. In addition, the number of black lawyers in Alabama is increasing rapidly. Thus, the proposed circuit with two black lawyers will have more in the near future. Again, the majority ignores the fact that the remedy is prospective in nature.

2. Subdistricts

The appellants have also proposed dividing the other eight challenged circuits into subdistricts. Federal courts have implemented subdistricting as a remedy in the judicial election context. *See Lopez v. Monterey County, Cal.*, 871 F. Supp. 1254 (N.D. Cal. 1994); *Clark v. Roemer*, 777 F. Supp. 471 (M.D. La. 1991); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). Nonetheless, the majority rejects this alternative, arguing that it would: (1) defeat Alabama's interest in having judges accountable to the entire circuit for which they serve; and (2) unduly pressure judges to favor constituents in their subdistricts.

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[16] The following statistics are included in defendant's exhibit 76.

The fallacy of such arguments has been well documented. *See Nipper*, 39 F. 3d at 1557-58 (Hatchett, J., dissenting); *LULAC*, 999 F. 2d at 918-21 (King, J., dissenting). Some points, however, bear elaboration.

The majority asserts that in order to maintain judicial accountability, an Alabama court's territorial jurisdiction must be linked to its electorate. The majority does not clearly explain how this linkage actually enforces judicial accountability, but essentially indicates that such accountability is fostered if the litigants that appear before a judge also have the ability to vote for that judge. This argument, however, suffers from a fundamental flaw — an Alabama court's jurisdiction has nothing to do with the electoral territory that it represents. While certain geographical boundaries determine the electoral bases of Alabama judges, these same boundaries do not limit the kinds of cases the judges hear, nor do they limit what litigants will appear before the judges. Instead, Alabama's circuit courts are courts of general jurisdiction; thus, their judicial jurisdiction is defined in terms of subject matter, not electoral geography. *See* Ala. Const. amend. 328, § 6.04 (b); Ala. Code § 12-11-30 (1993). These constitutional and statutory provisions have nothing to do with the legislative decisions involved in the construction of Alabama's electoral boundaries.

Thus, although the majority characterizes the state's interest as linking a trial court's *jurisdiction* to its electorate, the linkage argument really involves *venue*. *See LULAC*, 999 F. 2d at 918-19 (King, J., dissenting). But, the "reality is that [Alabama's] venue rules do not, and were not meant to, ensure the accountability of judges." *LULAC*, 999 F. 2d at 919 (King, J., dissenting). Under Alabama's venue rules, trial judges may often hear civil cases in which none of the litigants are members of their

constituencies. *See, e.g.*, Ala. Code § 6-3-2 (a) (1) (1993) (actions to recover land "must be commenced in the county where the land or a material part thereof lies"); Ala. Code § 6-3-2 (a) (3) (1993) ("[P]ersonal actions...may be commenced...in the county in which the act or omission complained of may have been done or may have occurred."); Ala. Code § 6-3-2 (b) (1) (1993) ("All actions where real estate is the subject matter of the action...must be commenced in the county where the same or a material portion thereof is situated."); Ala. Code § 6-3-3 (1993) ("In all actions for work and labor done or breaches of contracts or covenants as to easements or rights-of-way, the action may be commenced in the county in which the work was done or in which the land is situated as to which the easement or right-of-way was granted."); Ala. R. Civ. P. 12(h) (allowing for the waiver of geographical venue restrictions). In criminal cases, "the venue of all public offenses is in the county in which the offense was committed." Ala. Code § 15-5-2 (1982). Thus, criminal defendants will often appear before judges for whom they did not have the opportunity to vote.

Likewise, under other provisions of the Alabama Code, trial judges frequently preside over non-constituents. For example, the Alabama chief justice may assign judges to hear cases outside of their own circuits "[w]henever the public good requires." Ala. Code § 12-2-36 (1993). Alabama law also allows the chief justice to call retired judges for "temporary active duty in any court." Ala. Code § 12-18-61 (1993). Statistics for the 1990 court year show that the chief justice invokes these provisions regularly.[17] In 1990, sixty-two circuit judges, fifty district judges, and twenty-seven retired judges heard

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[17] These statistics are included in defendant's exhibit 43. *See supra* note 15.

cases in courts in which they were not elected to serve. In addition, retired judges have routinely accepted part-time assignments in the circuit courts of the Tenth and Thirteenth Circuits, and the district courts in Jefferson and Mobile counties. As Alabama concedes in its 1990 judicial report: "Additional judge services, provided by active trial judges accepting out-of-circuit assignments and retired judges on active duty, provide direct benefits to the Alabama judiciary and the people of this state by helping to ensure that the dockets of courts throughout the state remain current."

In short, the majority fears that subdistricting will eliminate judicial accountability because judges may often preside over litigants who did not have the opportunity to vote for them. In Alabama, however, this happens all of the time. While I concede that under a subdistricting plan, trial judges may hear more cases involving non-constituents, I do not believe that this increase is significant in view of the large number of non-constituent cases already being heard. Essentially, the majority must believe that the current number of non-constituent cases does not inhibit judicial accountability, but that adding more of such cases under a subdistricting plan would somehow violate a magical threshold, thereby reducing judicial accountability to an impermissible degree. After considering the current number of non-constituent cases in Alabama's system, however, I can only conclude that subdistricting is an alternative remedy "within the confines of the state's judicial model." *Nipper*, 39 F. 3d at 1531. Furthermore, the increased number of non-constituent cases that may result will "not undermine the administration of justice." *Nipper*, 39 F. 3d at 1531.

The majority also contends that subdistricting will

"undermine the administration of justice" in another respect: it believes that "small" subdistricts will lead to "home cooking" and race-based justice because trial judges will succumb to pressure to favor their constituents. The majority's fears have no basis in the record. At trial, witnesses involved with the *Martin* subdistricting plan implemented in Mississippi testified that "home cooking" played no part in their judicial system. Furthermore, the record shows that the smallest subdistrict proposed would have a population of 22,754; twenty-one of the sixty-seven counties in Alabama, each with a separate district court, have smaller populations. Since "home cooking" is not a problem in these present counties, it should not be a problem in more populous subdistricts. Finally, the record shows that majority black counties in Alabama have elected four black probate judges. Nobody has alleged that these judges engage in "home cooking" or race-based justice.

The majority's argument "is, at bottom, a smokescreen: It suggests that [trial] judges who are elected by white majorities...are responsive to the needs of all voters in the county — including minority voters. Yet it assumes that a judge elected from a majority-[black] district would somehow be less willing to follow his or her oath or to be responsible to the needs of all." *LULAC*, 999 F. 2d at 919-20 (King, J., dissenting). Unlike the majority, I believe that black judges elected from majority black subdistricts will carry out their duties in conformity with Alabama's Canons of Judicial Ethics. In sum, I find it "rather offensive to conclude that the impartiality of judges will somehow become tainted when elected from subdistricts that permit minority voters to elect their preferred candidates." *Nipper*, 39 F. 3d at 1558 (Hatchett, J., dissenting).

3. Cumulative Voting

Implementation of a cumulative voting scheme to remedy a section 2 violation is not without precedent. *See Cane v. Worcester County, Md.*, 874 F. supp. 687 (D. Md. 1995). In footnote 24, the majority implies that because the appellants have not proposed cumulative voting, this court need not consider such an alternative. Under section 2, however, courts have a duty to consider all potential remedies, not just those that the parties propose.

The majority states that even if the appellants had advocated cumulative voting, such a scheme would not be feasible because it would have "invidious effects...on the collegiality of the court as well as on lawyer interest in a judicial career." Both of these conclusions are seriously flawed.

First, it is outrageous to suggest that the collegiality of judges somehow constitutes a state interest that outweighs the need to remedy a section 2 violation. Alabama has an interest in having professional, not collegial, judges. Even assuming the notion that such "judicial bonding" is a legitimate state interest, concerns about it here are entirely misplaced. Alabama circuit and district judges are not members of multi-judge appellate panels; if they were, the state would possibly have a basis to make this collegiality argument. Instead, the judgeships at stake in this case are trial positions — circuit and district judges sit alone and run their own courtrooms. Therefore, in this instance, the state has no interest in judicial collegiality.

Even assuming, for the moment, that a state has an interest in fostering collegiality among its trial judges, such collegiality would not be sacrificed under a cumulative voting system. The majority's concern seems to be

that collegiality will be sacrificed because judges will be forced to run against each other in elections. The majority's reasoning, however, is trapped in the paradigm of numbered-place election systems. Under a cumulative voting system, candidates do not run against each other in the typical "head-to-head" format of a numbered-place system. Instead, candidates run for several positions. As a result, candidates need not defeat all of their opponents to win an office. In addition, because of the increased number of participants, a candidate's opposition is less centralized. As such, self-promotion, as opposed to negative campaigning, is the wise campaign strategy under a cumulative voting system. *See* Linda Maguire, *An Interview with Lani Guinier*, 19 Fletcher Forum of World Affairs 99 (1995) ("[I]t is much harder to engage in negative campaigning when you run against five or six people than when you run against just one, because at some level you have to give voters an affirmative reason to vote for you, as opposed to just not voting for the other candidate."); Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 Cardozo L. Rev. 1135, 1137 (1993) ("[N]egative campaigning is less effective in elections with multiple winners than in elections with only one opponent."). Accordingly, cumulative voting systems breed less contentious elections.

Moreover, ethical codes dictate that judicial candidates should abstain from egregious negative campaigning. Canon 7 of the Alabama Canons of Judicial Ethics provides that judicial candidates "[s]hould maintain the dignity appropriate to judicial office" while campaigning. Canon 7 also states that a judicial candidate: "Should not make pledges or promises of conduct in office other than the faithful and impartial performances

of the duties of the office; should not announce and advance his conclusions of law on pending litigation; and should not misrepresent his identity, qualifications, present position or other fact." Because of these restrictions, judicial elections should be less contentious than elections for legislative or executive governmental positions.

The majority's second problem with cumulative voting is that it will discourage lawyers from running for judgeships. The majority does not explain its reasoning, and I do not find it self-evident. Chief Judge Tjoflat, however, made the same argument in *Nipper*, explaining that lawyers will be deterred from running for office under a cumulative voting system because: (1) if victorious, they will have to begin running for reelection from the moment they take office; (2) they will have to compete against every judge up for reelection; and (3) the power of incumbency will no longer ensure retention in office. *See Nipper*, 39 F. 3d at 1546.

I do not understand the reasoning behind the first proposition. I see no reason why judges would have to engage in longer reelection campaigns under a cumulative voting system. In fact, campaigning under a cumulative voting system should be less time consuming. As explained, cumulative voting systems foster campaign strategies of self-promotion and thus do not encourage the additional burden of negative campaigning. Moreover, Alabama trial judges serve lengthy terms — circuit and district judges are elected to a six-year tenure. *See* Ala. Const. amend. 328, § 6.15 (1973). It remains unclear to me why judges would need six years to run for re-election under a cumulative voting scheme.

Chief Judge Tjoflat's second and third reasons are contradictory. The second reason states that lawyers will

not run for judicial office under a cumulative voting system because they will be faced with the onerous task of having to defeat multiple incumbent judges. The third reason, however, states that the power of incumbency dissipates under a cumulative voting system. Putting this contradiction aside, neither proposition stands on its own merit; both seem concerned with cumulative voting generating increased competition for achieving and retaining judgeships. I do not view increased competition for judicial positions as a negative. In my view, a more competitive process will produce better, more dedicated, judges. In fact, this is the strength of a cumulative voting scheme.

C. Applying the Totality-of-the-Circumstances Prong

Although the appellants have made a strong showing of vote dilution under the *Gingles* factors, their case becomes even more compelling after considering the relevant factors in the totality-of-the-circumstances prong. Indeed, six Senate Report factors strongly weigh in favor of a finding of vote dilution.

1. Extent Blacks Have Been Elected to Public Office

The most important Senate Report factor is the extent to which blacks have been elected to public office. As has already been detailed, only one black lawyer has ever first attained a circuit or district judgeship through election in the ten challenged circuits. That victorious candidate ran unopposed. Of the eighty-four contested judgeship positions, blacks only fill six; all six judges were appointed.

In the ten challenged circuits, black electoral success has largely been limited to single-member districts and majority black counties.[18] In 1991, ninety-three percent of

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[18] The following statistics are included in plaintiff's exhibits eighty-seven and eighty-eight.

black office holders in the counties at issue represented single-member districts or majority black counties. Only six black officials, including five initially appointed to office, served at-large in majority white counties. Of the 213 total officials who served at-large in the majority white counties at issue, 97 percent were white.

2. History of Voting-Related Discrimination

The parties stipulated to the sad history of voting-related discrimination in Alabama. For the sake of brevity, I will relate a mere sampling of this history, and will only begin the chronology after the passage of the Fifteenth Amendment.

In 1893, the Alabama Legislature passed the Sayre Law, a complex election statute specifically intended to disfranchise blacks. The Alabama Legislature, however, was not satisfied, and, at its 1901 constitutional convention, passed a full host of voter qualifications specifically intended to disfranchise the black citizens of Alabama. The following year, the Alabama Democratic Party limited the right to vote in its primary to white males.

After the Supreme Court outlawed white primaries in 1944, Alabama adopted the Boswell Amendment, which required an applicant for the franchise to demonstrate a satisfactory understanding of a section of the United States Constitution. The intent of the Boswell Amendment was to discriminate against applicants on the basis of race. Then, in 1951, Alabama amended its constitution to restrict voter registration to those who could read and write an article of the United States Constitution, and were of "good character."

In 1957, the Alabama Legislature changed the boundaries of the city of Tuskegee from a four-sided square to

a twenty-eight-sided configuration in order to remove black voters from the city. In the same year, the Alabama Legislature, with a discriminatory intent, established a committee to abolish Macon County, whose population was ninety percent black. While the state of Alabama took these discriminatory measures as a whole, individual public officials continuously engaged in a pattern of harassment, intimidation, and brutality against blacks attempting to register to vote.

In 1965, before Congress enacted the Voting Rights Act, the Alabama Legislature adopted a resolution which implored its representatives in Washington to oppose the federal legislation. After Congress passed the Act, intimidation against blacks attempting to register continued. In some instances, officials engaged in a pattern of baseless arrests of prominent black leaders as a means of intimidating black citizens from registering. Also in 1965, in an effort to exclude blacks from participating in state government, the Alabama Legislature passed a racially gerrymandered reapportionment scheme. Until 1966, Alabama required its citizens, with the specific intent of disfranchising black voters, to pay a poll tax. Finally, as late as 1984, blacks were underrepresented as poll officials.

3. Typical Discriminatory Voting Practices

The third Senate Report factor asks whether the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices that may enhance the opportunity for discrimination against a minority group. The at-large, numbered place, and majority vote requirements in the challenged circuits and districts constitute the type of election system that this Senate Report factor contemplates as enhancing the opportunity for discrimination.

It is important to note that this Senate Report factor simply considers whether the state has used "voting practices or procedures that *may enhance the opportunity* for discrimination against the minority group." S. Rep. No. 417, at 29, *reprinted in* 1982 U.S.C.C.A.N. at 206 (emphasis added). Thus, this Senate Report factor is simply concerned with the *potential effects* of the voting practices; it does not ask whether the state has implemented its voting procedures with a discriminatory intent. In his concurrence, Judge Edmondson seems to believe, mistakenly, that the totality-of-the-circumstances prong requires an inquiry into a state's intent in implementing its voting system. Such an inquiry may be determinative of a constitutional challenge, but is *clearly* not essential to a section 2 challenge. *See Chisom*, 501 U.S. at 384 ("In 1982, Congress amended § 2 of the Voting Rights Act to make clear that certain practices and procedures that *result* in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge.") (footnote omitted); *Nipper*, 39 F. 3d at 1548-56 (Hatchett, J., dissenting) (detailing Supreme Court precedent and the Act's legislative history in response to the assertion that the totality-of-the-circumstances prong requires a showing of discriminatory intent in the voting community); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup. Ct. Rev. 245, 250-51 ("Originally, the liability standard under the Voting Rights Act dovetailed with the constitutional standard. But in 1982 the Act was amended to eliminate the requirement that plaintiffs show a discriminatory purpose; proof of a dilutive effect is enough.").[19]

In fact, the appellants challenged the at-large, numbered place system for electing judges on equal protection grounds in the district court, alleging that Alabama has

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[19] A showing of discriminatory intent is helpful in proving a section 2 claim. But, a failure to show a state's discriminatory intent does

maintained it for discriminatory reasons. The district court rejected their claim. Even though the appellants have not appealed that decision, this may be why the majority and Judge Edmondson feel compelled to note that "there was no evidence that the at-large, majority vote, and numbered place requirements were instituted or are being maintained for discriminatory purposes." As I have stated, this fact is, for the most part, irrelevant to the holding of this case. Nonetheless, I am compelled to respond to the assertion that this record is without any evidence of Alabama's discriminatory intent.

The parties stipulated to the following facts: From 1876 to 1976, Mobile County employed a numbered place, at-large system to elect its board of school commissioners in order to discriminate against blacks and to deny them access to political office. Similarly, from 1911 to 1982, the city of Mobile operated under a commission form of government, which employed a numbered place, at-large system; the adoption and maintenance of this system was racially motivated. In 1957, the Montgomery County Commission adopted a numbered place, at-large election system for the purpose of diluting black voting strength and keeping blacks out of office.[20]

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not in any way hamper a minority voter's ability to show a section 2 violation. In other words, the issue of discriminatory intent can only help, and cannot hurt, a section 2 plaintiff. Judge Edmondson is simply incorrect when he states that a failure to show discriminatory intent can, "[w]ith a single stroke, strike in favor of [the state] the balance of circumstances[,]" for the state's discriminatory intent is not required in this Senate Report factor, or in any of the other factors in the totality-of-the-circumstances prong. Put simply, the law is overwhelmingly clear that section 2 does not *require* minority voters to show a state's discriminatory intent in implementing its voting system.

[20] I have chosen to simply set out the *stipulated* facts. I note, however, that the appellants presented evidence that the Alabama legisla-

While this evidence does not directly show that Alabama has maintained its at-large, numbered place system of electing judges in order to discriminate against blacks, I find it highly persuasive. It is hard to imagine that Alabama's motivation for maintaining its at-large, numbered place system of electing judges is completely innocent, while entities throughout the state have implemented and maintained such systems for discriminatory purposes. In short, it is obvious that Alabama "has used voting practices and procedures meant to discriminate against the African-American community" — the same voting practices and procedures that it uses to elect judges. *White*, 867 F. Supp. at 1556.

4. Discrimination in Education, Employment, and Health

"[B]lacks in Alabama have suffered from the state's discrimination in all aspects of their lives." *White*, 867 F. Supp. at 1555. The parties stipulated to Alabama's discriminatory history in the area of health. For example, until the late 1960s, Alabama's mental health facilities were segregated, and those that serviced blacks were often inferior. The parties also stipulated to Alabama's long history of discriminating against blacks in employment. For example, until 1972, the Alabama Department of Public Safety refused to hire black state troopers. Although Alabama was prohibited from further employment discrimination in the early 1970s, its progress in employing blacks was minimal. As late as

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ture enacted Act 221, which implemented a numbered place system for electing all multimember officials, with a discriminatory intent. Appellants also presented evidence that Act 221 was meant to apply to judicial elections. The majority and Judge Edmondson may not wish to accept this evidence, but to say that the record is completely devoid of such evidence is simply not true.

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1976, the state continued to use invalidated examinations that screened out disproportionate numbers of black applicants.

Most relevant to this case, however, is Alabama's long history of educational discrimination. Until the 1960s, Alabama maintained a segregated school system. Also until the 1960s, the University of Alabama School of Law, the only state-supported law school, refused to admit black applicants. The first black law student enrolled in 1964, but no black students enrolled thereafter until 1968. The first black law student was graduated in 1972.

In conducting the vote dilution inquiry, the district court repeatedly explained that the shortage of black judges was due to a shortage of black lawyers; the district court even implied that, when considering the number of black lawyers, blacks are overrepresented on the bench. *SCLC*, 785 F. Supp. at 1476-77, 80-87. "First, in assessing the extent to which minority candidates have been elected to public office, the appropriate comparison pool has always been the number of minorities in the population[,]" not the number of potential candidates. *LULAC*, 999 F. 2d at 913 (King, J., dissenting); *see also White*, 867 F. Supp. at 1562 ("Section 2 is concerned with the political opportunities of 'members of the electorate.' The Act was not passed to protect the rights of candidates.") (quoting 42 U.S.C. § 1973(b)). More importantly, however, the district court turned Alabama's discrimination against blacks in the field of education — which is supposed to weigh in favor of a finding of vote dilution — on its head; instead of using this factor as a sign of vote dilution, the district court did just the opposite. *See LULAC*, 999 F. 2d at 913 (King, J., dissenting) ("the comparative lack of minority lawyers constitutes evi-

dence of the lingering socio-economic effects of discrimination, which argues in favor of a vote dilution finding"). Thus, the district court could not have applied this factor more incorrectly. In sum, the district court's reasoning wrongly suggests that "blacks are somehow responsible for their own plight — i.e., for their persistent low enrollment in law school." *LULAC*, 999 F. 2d at 913 (King, J., dissenting).

5. Racial Appeals in Political Campaigns

Appellants presented evidence of campaigns in which white judicial candidates, who were facing black opponents, made racial appeals. These candidates ran the pictures of their black opponents in newspapers.[21] The district court found that these racial appeals were insignificant because the black candidates eventually won their elections. This Senate Report factor, however, does not ask whether the racial appeals were successful; it simply asks whether they were made, and, in this case, they were made.

6. Alabama's Tenuous Interests (Revisited)

Finally, I have already assessed Alabama's interests in maintaining its judicial system when I applied the first and second *Gingles* factors in part III (B). Although I recognize this court's requirement that I once again weigh the state's interests, my assessment has not changed since part III (B). All of Alabama's interests in maintaining its current judicial system are tenuous. Thus, this factor actually weighs in favor of a finding of a section 2 violation.

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[21] Unfortunately, it appears that these racial appeals still occur in Alabama. The 1994 Democratic primary for state auditor involved the same campaign tactic. *See White*, 867 F. Supp. at 1556.

IV. Conclusion

I have engaged in this exhaustive and repetitive analysis because one of the major shortcomings of the majority's opinion is that it fails to rigorously apply the law of this circuit, and the relevant facts to that law. After engaging in this step-by-step analysis, it becomes apparent that the appellants have shown racially polarized voting, and, ultimately, a section 2 violation. Because I believe that recircuiting, subdistricting, and cumulative voting are feasible remedies for this violation, I respectfully dissent.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

SOUTHERN CHRISTIAN LEADERSHIP
CONFERENCE OF ALABAMA, et al.,

PLAINTIFFS,

V.

JAMES H. EVANS, et al.,

DEFENDANTS

CIVIL ACTION NO. 88-H-462-N

STIPULATIONS
(Revised 12/9/91)

35. The Alabama Code of 1876 restricted the testimony of blacks to those cases where freedmen, free negroes, or mulattoes ; or where a freedman, free negro or mulatto was a witness against a white person or vice versa. *See* Ala. Acts, 1865-1867, p. 98; repealed by Ala. Code, 1967, § 10.

36. For many years, Alabama systematically excluded blacks from grand and petit juries. *See Norris v. Alabama,* 294 U.S. 587 (1935); *Patterson v. Alabama,* 294 U.S. 600 (1935); *Rogers v. Alabama,* 192 U.S. 226 (1904); *Black v. Curb,* 464 F. 2d 165 (5th Cir. 1972); *Seals v. Wiman,* 304 F. 2d 53 (5th Cir. 1962); *White v. Crook,* 251 F. Supp.

401 (M.D. Ala. 1966) (three-judge court); *Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966).

37. Alabama courtrooms were at times segregated. *See* "Judge Jones on Courtroom Segregation," The Alabama Lawyer, Vol. 22 No. 2 (April 1961), at p. 190.

38. Alabama law required the jails and prisons to be segregated until the late 1960's. *See Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966) (three-judge court), *aff'd*, 390 U.S. 333 (1967).

39. In a joint resolution commending Governor Wallace "for his prompt action in dispatching the Alabama highway patrol and other law enforcement officers to Birmingham to quell the mob violence in that city," the Legislature also stated that "the executive branch of the federal government has long assumed a policy of tacit encouragement and active support of irresponsible racist agitators sent into this state to defy our laws and to deliberately inflame unstable emotions into frenzied, savage, racial violence...." Ala. Acts 1963, pp. 387, 386. In a commendation to the state public safety director and the state highway patrol, the Legislature characterized the disturbance as "depredations upon persons and property incited by trained out of state racist agitators." Ala. Acts. 1963, p. 388.

40. Until 1972, the Alabama Department of Public safety refused to hire black state troopers. *See Paradise v. Prescott*, 585 F. Supp. 72 (M.D. Ala. 1983), *aff'd*, 480 U.S. 149 (1987).

41. After the court ordered the trooper force to be integrated, the State failed to implement a promotion plan that did not have a disparate impact on blacks until at least 1987. *See United States v. Paradise*, 480 U.S. 149 (1987).

42. The Sayre Law, a complex election statute passed

in 1893, was expressly designed to legally eliminate blacks from politics in Alabama. "Black voter turnout statistics after 1892 showed that the Sayre Law substantially accomplished its goal of disfranchisement; black participation in terms of voter turnout dropped by twenty-two percent (22%) from 1892 to 1894 and thereafter remained below fifty percent (50%)." *See Bolden v. City of Mobile, Alabama*, 542 F. Supp. 1050, 1062 (M.D. Ala. 1982).

43. In 1901, the Alabama Legislature passed an act calling for a constitutional convention in order to permanently restrict state suffrage rights. The primary purpose of the all-white 1901 constitutional convention was to disfranchise the black and poor illiterate white electorate and to remove blacks and poor illiterate whites completely from the political process. The 1901 convention produced a full host of voter qualifications that immediately disfranchised almost every black citizen of Alabama. *See Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1358 (M.D. Ala. 1986); *Bolden v. City of Mobile, Alabama*, 542 F. Supp. 1050, 1062 (M.D. Ala. 1982).

44. From 1901 to 1966, Alabama required persons to pay a poll tax in order to vote in any election. The purpose and effect of the poll tax was to disfranchise black voters. Additionally, for those blacks with the ability to pay the poll tax, a greater burden of compliance was placed on them than on whites. *See United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court).

45. In 1902 the Alabama Democratic Party limited the right to vote in the Democratic primary to white males who pledged to support the nominees of the Democratic Party. Minutes of the 7/10/02 Democratic State Executive Committee. *See* Alabama Democratic Party Minutes, Book 5, p. 67, Alabama Department of Archives

and History, Range H, Section 3, Shelf A, Box 1.

46. After the U.S. Supreme Court outlawed white primaries in *Smith v. Allwright*, 321 U.S. 649 (1944), the State of Alabama adopted the Boswell Amendment which required an applicant for the franchise to demonstrate a satisfactory understanding of a section of the Constitution of the United States. The Amendment was intended to be and was used for the purpose of discriminating against applicants on the basis of race. As of March 1, 1948, the Mobile county Board of Registrars had registered 2800 whites and 104 blacks. *See Davis v. Schnell*, 81 F. Supp. 872, 876, (S.D. Ala. 1949) (three-judge court), *aff'd* 336 U.S. 932 (1950).

47. Amendment 91 of the Alabama Constitution (adopted in 1951) allowed registration only of those who could read and write any article of the U.S. constitution in the English language, were of "good character," and "who embrace the duties and obligations of citizenship." Boards of registrars were declared to be judicial officers. The Alabama Supreme Court was required to prepare questionnaires to be used by local registrars.

48. The Alabama Supreme court promulgated a four-page questionnaire that required the applicant to write their name ten times in answer to several questions, explain their business or employment background three times, answer two different questions regarding length of residence in several places, and give their spouse's place of birth. *See* U.S. Commission on Civil Rights, Voting: Hearings held in Montgomery, December 8-9, 1958, and January 9, 1957 (1959), pp. 17-20.

49. Ala. Const., Amend. 223 (proposed Amendment No. 2 adopted in 1965), required applicants for voter registration to demonstrate the ability to read and write English. The voters approved the amendment by a mar-

gin of 93,647 to 37,137 with a majority in favor in every county. *See ADAH*, Alabama Official and Statistical Register 1967, pp. 687-88, 707-9.

50. On March 23, 1965, the United States Senate began public hearings on the legislation that became enacted as the Voting Rights Act of 1965. "On the day before [these hearings began], March 22, 1965, the Alabama Legislature adopted a resolution condemning 'outside agitators, communist sympathizers, and well meaning, but socially ignorant crusaders, [who have] skillfully laid the ground work for such a vicious piece of legislation by stirring up strife and dissension in this area in particular and throughout this country generally.' The resolution implored Alabama's congressional delegation in Washington 'to use every effort and all means available to prevent this vicious proposal from being presented to Congress, and to redouble their efforts to defeat it if it is so introduced.' " *See Hale County v. United States*, 496 F. Supp. 1206, 1210 (D.C. D.C. 1980) (three-judge court) (quoting Act No. 98, 1965 Ala. Acts 112).

51. Prior to the passage of the Voting Rights Act, some public officials in Alabama engaged in a pattern of harassment, intimidation, and brutality against blacks attempting to register to vote. *See Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965).

52. At least until 1960, the state and many county registrars offices, including Dallas, Macon, Montgomery, Perry, and wilcox Counties, deliberately and consistently engaged in procedures and practices which favored white applicants to vote and discriminated against black applicants. *See United States v. Atkins*, 323 F. 2d 733 (5th Cir. 1963) (Dallas); *United States v. Parker*, 236 F. Supp. 511 (M.D. Ala. 1964) (Montgomery); *United States v.*

Mayton, 335 F. 2d 153 (5th Cir. 1964) (Perry); *Alabama v. United States*, 304 F. 2d 583 (5th Cir. 1964) (Macon); *United States v. Logan*, 344 F. 2d 290 (5th Cir. 1965) (Wilcox).

53. After the passage of the Voting Rights Act, intimidation against blacks attempting to register to vote continued. In Dallas County, for example, officials engaged in a pattern of baseless arrests and prosecutions of prominent black leaders as a means of intimidating black citizens from registering. *See United States v. McLeod*, 385 F. 2d 734 (5th Cir. 1967); *see also Clark v. Boynton*, 362 F.2d 992 (5th Cir. 1966).

54. In an effort to exclude blacks from participating in state government, the Alabama Legislature, in 1965, passed a racially gerrymandered reapportionment scheme for the state legislature. The unconstitutional plan included the combination of Macon, Elmore, and Tallapoosa Counties into one district and Bullock, Pike, Coffee, and Geneva into another. The purpose of these two particular groupings was to dilute the black votes of Macon and Bullock Counties. *See Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965).

55. On August 7, 1965, the State of Alabama was certified by the Attorney General of the United States, as a state subject to the provisions of the Voting Rights Act of 1965. Several days later, the Attorney General certified in accordance with Section 6 of the Act that the appointment of federal examiners for Lowndes, Marengo, Perry, and Wilcox Counties was necessary to enforce the guarantees of the Fifteenth Amendment. *See Sims v. Baggett*, 247 F. Supp. 96, 108 (M.D. 1965).

56. At least until 1984, there was an under-representation of black poll officials. One county with a substantial black population (26.2%) had no black poll officials.

Among poll officials, disproportionately few blacks served as chief inspector, chief clerk, and returning officer. *See Harris v. Graddick*, 593 F. Supp. 128, 131-32 (M.D. Ala. 1984).

57. At least until 1980, strong racially polarized voting existed in Hale County, Alabama. *See Hale county, Alabama v. United States*, 496 F. Supp. 1206, 1213 (D.C. D.C. 1980) (three-judge court).

58. In 1965, the form of election system for Hale County Commissioners was changed from single member districts to an at-large election system (with sub-district residency requirements). *See Hale County, Alabama v. United States*, 496 F. Supp. 1206, 1216 (D.C. D.C. 1980) (three-judge court).

59. From 1876 to 1976, Mobile County elected its Board of School Commissioners by a numbered place, at-large election system. The purpose of this system and its effect was to discriminate against blacks and to deny them access to the political process and political office. *See Brown v. board of School Commissioners of Mobile county, Alabama*, 706 F. 2d 1103, 1107 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983).

60. From 1911 to 1982, the City of Mobile operated under a commission form of government elected by a numbered place, at-large system. The adoption and maintenance of this system was racially motivated. *See Bolden v. City of Mobile, Alabama*, 542 F. supp. 1050 (M.D. Ala. 1982).

61. At least until 1982, racially polarized voting occurred in Mobile County. *See Brown v. Board of School Commissioners of Mobile County, Alabama*, 542 F. Supp. 1078, 1091 (S.D. Ala. 1982), *aff'd*, 464 U.S. 1005 (1983); *Bolden v. City of Mobile, Alabama*, 542 F. supp. 1050, 1062 (M.D. Ala. 1982).

62. After black members were elected to the Mobile County board of School Commissioners, the School Board changed the powers of the Commissioners so as to enhance the voting power of the white commissioners. This change was intended to dilute black voting strength. *See Brown v. board of School Commissioners of Mobile county, Alabama,* 542 F. supp. 1078, 1107 (S.D. Ala. 1982), *aff'd,* 464 U.S. 1005 (1983).

63. Act 685, passed in 1957, instituted a numbered place, at-large election system for the Montgomery county Commission. The purpose and effect of this system was to dilute black voting strength and to keep blacks from being elected to office. *See Hendrix v. McKinney,* 460 F. Supp. 626, 630 (M.D. Ala. 1978).

64. At least until 1978, voting in Montgomery county was, to a substantial degree, polarized by race. *See Hendrix v. McKinney,* 460 F. Supp. 626, 630 (M.D. Ala. 1978).

65. In 1983, the City of Montgomery enacted a plan for the City Council that reduced the black voting age population in one district. The purpose of the plan was to dilute the voting strength of blacks in that district. *See Buskey v. Oliver,* 565 F. Supp. 1473 (M.D. Ala. 1983).

66. At least until 1975, blacks in the City of Dothan in Houston County were excluded from every phase of the local political process. *See Yelverton v. Driggers,* 370 F. Supp. 612 (M.D. Ala. 1974).

67. The at-large election system (with sub-district residency requirements) for the Dothan City Commissioners had the effect of diluting the political power of blacks in the city. *See Yelverton V. Driggers,* 370 F. Supp. 612 (M.D. Ala. 1974).

68. In 1957, the Alabama Legislature enacted Local Act No. 140, redefining the boundaries of the City of

Tuskegee in Macon County. The purpose of the act, which changed the boundaries from a four-sided square to a twenty-eight-sided configuration, was to remove from the City all but four or five 400 black voters. Not a single white voter or resident was removed by the change. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

69. In 1957, the Alabama Legislature established a committee to abolish Macon County, whose population was 90 percent black. The purpose of this committee "was to maintain segregation." The Committee's creation was consistent with the notion that "[o]nly merging Macon County into the surrounding counties...would preclude blacks from being elected to public office, including the Macon County Commission." *See Hendrix v. McKinney*, 460 F. Supp. 626, 628 (M.D. Ala. 1978).

70. From 1956 to 1964, the Attorney General of Alabama and the Alabama Supreme court attempted to exclude the NAACP from operating in Alabama. The NAACP was encouraging black citizens to assert their constitutional rights and to protest against segregation. *See NAACP v. Alabama*, 377 U.S. 288 (1964).

71. Until the 1960's, Alabama maintained a segregated school system. The education opportunities accorded to black students were inferior to opportunities accorded to white students. *See Lee v. Macon County Board of Ed.*, 231 F. Supp. 743 (M.D. Ala. 1964) (three-judge court).

72. Deleted by agreement.

73. Until the 1960's, the University of Alabama School of Law (the only state supported law school in Alabama) had a practice of refusing admission to black applicants. The first black student to enroll in the University of Alabama School of Law enrolled in 1964. There were no black students enrolled during the school

years 1965 through 1968. The first black law student to graduate graduated in 1972.

74. For most of this century, blacks were excluded from public parks, *see Gilmore v. City of Montgomery,* 176 F. Supp. 776 (M.D. Ala. 1959), *modified,* 277 F. 2d 364 (5th Cir. 1960), recreational facilities, *see Smith v. Y.M.C.A.,* 316 F. Supp. 899 (M.D. Ala.), *aff'd as modified,* 462 F. 2d 634 (5th Cir. 1970); *Faulkner v. City of Gadsden,* 9 Race Rel. L. Rep. 876 (1964), public libraries and museums, *see Cobb v. Montgomery Library Board,* 207 F. Supp. 880 (M.D. Ala. 1962), and public golf courses, *See Sawyer v. City of Mobile,* 208 F. Supp. 548 (S.D. Ala. 1961).

75. Until the late 1960's, Alabama mental health facilities were segregated, and those that serviced blacks were often inferior. *See Marable v. Alabama Mental Health Board,* 297 F. supp. 291 (M.D. Ala. 1969) (three-judge court).

76. Until the early 1960's, Alabama law required most forms of public transportation to be segregated. *See United States v. City of Montgomery,* 201 F. Supp. 590 (M.D. Ala. 1962) (municipal airport facilities); *Lewis V. Greyhound Corp.,* 199 F. Supp. 210 (M.D. Ala. 1961) (bus terminals); *Browder v. Gayle,* 142 F. Supp. 707 (M.D. Ala.) (three-judge court), *aff'd mem.,* 352 U.S. 903 (1956) (city buses).

77. The State of Alabama has a long history of discriminating against blacks in employment. *See United States v. Frazer,* 317 F. Supp. 1079 (M.D. Ala. 1970). Although the state was prohibited in 1970 from further discrimination, its progress in employing blacks was minimal and, at many state agencies, nonexistent as late as 1976. *See United States v. Frazer,* 14 Empl. Prac. Dec. (CCH) ¶7599 at 4933 (M.D. Ala. 1976). As late as 1976, the state continued to use invalidated examinations that

screened out disproportionate numbers of black applicants. *Id*, at 4931.

78. Alabama law, until 1975, defined race. Ala. Code, 1907, p. 218, Section 2 provided: "The term 'negro' within the meaning of this Code includes mulatto. The term 'mulatto,' or 'person of color,'...is a person of mixed blood, descended on the part of the father or mother from negro ancestors, to the fifth generation inclusive, though one ancestor of each generation may have been a white person." (The fifth generation was substituted for the third generation by the Code Committee of the 1907 Code. Prior to this, the third generation was the term used in the laws.) Ala. Laws, 1927, p. 716, redefined mulatto to include a person descended "from negro ancestors, without reference to or limit of time or number of generations removed." The recodification of this section, Ala. Code, tit. 1, §2 (1940), includes the following Editor's Note:

> Prior to 1927 a person was a "negro" if descended on the part of the father or mother from negro ancestors, to the fifth generation inclusive, although one ancestor may have been a white person. See Code 1923, §2 (5). At this time there was a great diversity among the states as to the legal definition of a "negro," which resulted in the regrettable situation of a person today being legally a white person, and tomorrow after a short migration, being legally a colored person. In 1927, the legislative bodies of a great many states, working along with same line, amended their statutes so as to define the term as defined in the instant section. This definition, while a strict one, has the advantage of being sure and uniform.

Ala. Code, 1975, §1-1-10 eliminated the word "Negro"

from its definitions.

79. After the passage of the Civil Rights Act of 1957, some state and local officials in Alabama resisted efforts by the federal government to investigate possible violations of the Act. Oftentimes, the United States had to resort to federal court to subpoena witnesses and records from various officials. *See In Re Wallace,* 170 F. Supp. 63 (M.D. Ala. 1959); *State of Alabama ex rel Gallion,* 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd* 85 F. 2d 430 (5th Cir.), *cert. denied,* 366 U.S. 913 (1961); *Kennedy v. Bruce,* 98 F. 2d 860 (5th Cir. 196).

80. At least until 1986, racially polarized voting existed in Dallas County. *See United States v. Dallas County Commission,* 636 F. Supp. 704 (S.D. Ala. 1986).

81. From 1901 to 1986, the form of election system for the Dallas County Commission — at large, with numbered posts — operated to dilute the voting strength of black citizens. *See United States v. Dallas County Commission,* 636 F. Supp. 704 (S.D. Ala. 1986).

82. At present there are 68 probate judges in the State of Alabama. The four who are black are elected from black majority voting age population counties.

Done this 2nd day of December, 1991.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6257

D.C. DOCKET NO. 88-H-00462-N

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF ALABAMA on behalf of its members and on behalf of a state-wide class of black voters, REVEREND JOHN L. ALFORD, individually and on behalf of a class of black voters in the Fifteenth Circuit and District of Montgomery County, REVEREND ABRAHAM WOODS, JR., individually and on behalf of a class of black voters in the Tenth Circuit and District of Jefferson County, REVEREND P. H. LEWIS, individually and on behalf of a class of black voters in the Thirteenth Circuit and District of Mobile County, GEORGE W. GRAYSON, individually and on behalf of a class of black voters in the Twenty-Third Circuit, CHARLES STEELE, JR., individually and on behalf of a class of black voters in the Sixth Circuit, REVEREND JOHN NETTLES, individually and on behalf of a class of black voters in the Seventh Circuit, PEARLEAN S. JACKSON, individually and on behalf of a class of black voters in the Twentieth Circuit, REVEREND JAMES MILTON, individually and on behalf of a class of black voters in the Fifth Circuit, JESSE R. WILLIAMS, individually and on behalf of a class of black voters in the Fourth Circuit, EDWIN L. MOSS, individually and on behalf of a class of black voters in the Fourth Circuit, LUTHER P. CARMICHAEL, individ-

ually and on behalf of a class of black voters in the Fourth Circuit, MARY K. STOVALL, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County, ARTHUR L. SUMBRY, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County, ALBERT TURNER, individually and on behalf of a class of black voters in the Fourth Circuit, J. S. THOMAS, individually and on behalf of a class of black voters in the Fourth Circuit and MALCOLM R. NEWMAN, individually and on behalf of a class of black voters in the Twentieth Circuit,

Plaintiffs-Appellants,

versus

ATTORNEY GENERAL JAMES H. EVANS; CHIEF JUSTICE SONNY HORNSBY; SECRETARY OF STATE BILLY JOE CAMP; WALKER HOBBIE, JR., Probate Judge, Montgomery County; MIKE BOLIN, Probate Judge, Jefferson County; GEORGE REYNOLDS, Probate Judge, Jefferson County; DAVID G. LIGHTSEY, Probate Judge, Bill County; ARTHUR G. MURRAY, Probate Judge, Calhoun County; EMERSON W. THOMPSON, Probate Judge, Chambers County; PHILLIP W. JORDAN, Probate Judge, Cleburne County; JOHN W. JONES, JR., Probate Judge, Dallas County; E. RILEY LUCAS, Probate Judge, Hale County; J.T. HARPE, Probate Judge, Henry County; CLETUS YOMANS, Probate Judge, Houston County; ALPHONSO MENEFEE, Probate Judge, Macon County; FRANK RIDDICK, Probate Judge, Madison County; W. L. NOONAN, Probate Judge, Mobile County; DONALD R.

COOK, Probate Judge, Perry County; MACK DIAMOND, Probate Judge, Randolph County; WALLACE K. BROWN, Probate Judge, Russell County; DONALD FOX, Probate Judge, Tallapoosa County; W. HARDY McCOLLUM, Probate Judge, Tuscaloosa County; JERRY BOGGAN, Probate Judge, Wilcox County;

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

February 28, 1994,

Before HATCHETT and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

The judgement of the district court is vacated and this case is remanded to the district court for reconsideration in light of *Nipper v. Chiles*, 1 F. 3d 1171 (1993).

VACATED AND REMANDED

COX, Circuit Judge, dissenting:
I dissent. In my view *Nipper* should be reconsidered.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6257

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF ALABAMA on behalf of its members and on behalf of a state-wide class of black voters, REVEREND JOHN L. ALFORD, individually and on behalf of a class of black voters in the Fifteenth Circuit and District of Montgomery County, REVEREND ABRAHAM WOODS, JR., individually and on behalf of a class of black voters in the Tenth Circuit and District of Jefferson County, REVEREND P.H. LEWIS, individually and on behalf of a class of black voters in the Thirteenth Circuit and District of Mobile County, GEORGE W. GRAYSON, individually and on behalf of a class of black voters in the Twenty-Third Circuit, CHARLES STEELE, JR., individually and on behalf of a class of black voters in the Sixth Circuit, REVEREND JOHN NETTLES, individually and on behalf of a class of black voters in the Seventh Circuit, PEARLEAN S. JACKSON, individually and on behalf of a class of black voters in the Twentieth Circuit, REVEREND JAMES MILTON, individually and on behalf of a class of black voters in the Fifth Circuit, JESSE R. WILLIAMS, individually and on behalf of a class of black voters in the Fourth Circuit, EDWIN L. MOSS, individually and on behalf of a class of black voters in the Fourth Circuit, LUTHER P. CARMICHAEL, individually and on behalf of a class of black voters in the Fourth Circuit, MARY K. STOVALL, individually and on

behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County, ARTHUR L. SUMBRY, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County, ALBERT TURNER, individually and on behalf of a class of black voters in the Fourth Circuit, J.S. THOMAS, individually and on behalf of a class of black voters in the Fourth Circuit and MALCOLM R. NEWMAN, individually and on behalf of a class of black voters in the Twentieth Circuit,

Plaintiffs-Appellants,

versus

ATTORNEY GENERAL JAMES H. EVANS; CHIEF JUSTICE SONNY HORNSBY; SECRETARY OF STATE BILLY JOE CAMP; WALKER HOBBIE, JR., Probate Judge, Montgomery County; MIKE BOLIN, Probate Judge, Jefferson County; GEORGE REYNOLDS, Probate Judge, Jefferson County; DAVID G. LIGHTSEY, Probate Judge, Bill County; ARTHUR G. MURRAY, Probate Judge, Calhoun County; EMERSON W. THOMPSON, Probate Judge, Chambers County; PHILLIP W. JORDAN, Probate Judge, Cleburne County; JOHN W. JONES, JR., Probate Judge, Dallas County; E. RILEY LUCAS, Probate Judge, Hale County; J.T. HARPE, Probate Judge, Henry County; CLETUS YOMANS, Probate Judge, Houston County; ALPHONSO MENEFEE, Probate Judge, Macon County; FRANK RIDDICK, Probate Judge, Madison County; W. L. NOONAN, Probate Judge, Mobile County; DONALD R. COOK, Probate Judge, Perry County; MACK DIAMOND, Probate Judge, Randolph County;

WALLACE K. BROWN, Probate Judge, Russell County; DONALD FOX, Probate Judge, Tallapoosa County; W. HARDY McCOLLUM, Probate Judge, Tuscaloosa County; JERRY BOGGAN, Probate Judge, Wilcox County;

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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(Panel Opinion February 28, 1994, 11th Cir., 1994,)____ F. 2d ____)
(March 23, 1994)

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH and BLACK, Circuit Judges.[8]

BY THE COURT:

A member of this court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above causes shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 88-H-462-N

SOUTHERN CHRISTIAN LEADERSHIP
CONFERENCE OF ALABAMA, on
behalf of its members and on
behalf of a state-wide class
of black voters; et al.,

PLAINTIFFS,

VS.

Attorney General JAMES H. EVANS, et al.,

DEFENDANTS

UNITED STATES OF AMERICA

AMICUS CURIAE

JUDGMENT

In accordance with the attached memorandum opinion, it is hereby ORDERED, ADJUDGED and DECREED that judgment be entered in favor of defendants and

against the plaintiffs on all claims advanced by the plaintiffs' complaint.

It is further ORDERED that court costs incurred in this proceeding be taxed against plaintiffs.

DONE this 18th day of March, 1992.

/s/ Truman Hobbs
Truman Hobbs
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF ALABAMA, on behalf of its members and on behalf of a state-wide class of black voters; et al.,

PLAINTIFFS,

VS.

Attorney General JAMES H. EVANS, et al.,

DEFENDANTS

UNITED STATES OF AMERICA

AMICUS CURIAE

CIVIL ACTION NO. 88-H-462-N

MEMORANDUM OPINION

This action was filed in May 1988 by black voters within various judicial circuits and districts in Alabama. Defendants are the Alabama Attorney General, the Chief Justice of the Alabama Supreme Court, the Alabama Secretary of State, and various probate judges. Plaintiffs

claim that the system for electing judges in Alabama leaves black voters without an equal opportunity "to participate in the political process and to elect representatives of their choice" in violation of the Voting Rights Act as amended, 42 U.S.C. § 1973. Plaintiffs also claim that the system is in violation of the Fourteenth and Fifteenth Amendments of the United States Constitution.

Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. §§ 1973(j) (f) and 1983.

On June 7, 1989, the court rejected defendants' contention that Section 2 of the Voting Rights Act does not apply to judicial elections, *SCLC v. Siegelman,* 714 F. Supp. 571 (M.D. Ala. 1989). After the Court of Appeals' decision in *League of United Latin American Citizens vs. Clements,* 914 F. 2d 620 (5th Cir. 1990) en banc), this Court stayed these proceedings (with the exception of discovery) to allow defendants to take an interlocutory appeal. When the Supreme Court of the United States held that judicial elections are covered by Section 2 of the Voting Rights Act, *Chisom v. Roemer,* ____ U.S. ____, 111 S. Ct. 2354 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas,* ____ U.S. ____, 111 S. Ct. 2376 (1991), defendants withdrew their appeal, and this case, which had been assigned to Judge Dubina, was reassigned to this Judge when Judge Dubina went to the Court of Appeals. The case was tried in December 1991.

For the reasons hereinafter stated, this Court concludes that the system of electing trial judges in Alabama does not deny black voters an equal opportunity to participate in the political process and to elect judges of their choice, nor does such system violate the Fourteenth or Fifteenth Amendment of the Constitution.

Alabama has a unified judicial system of trial and

appellate courts. The trial court of general jurisdiction is the circuit court with the district court being a trial court of limited jurisdiction. Circuit courts are divided into forty judicial circuits designated by number. Each circuit has one or more counties. At least one of the challenged circuits has as many as twenty-four circuit judges and some circuits have as few as two. Each county has at least one district judge. The number of circuit and district judges is set by the Legislature with the advice of the Alabama Supreme Court.

Judges are elected at large from their respective circuits or districts. Candidates for judicial office in circuits or districts with more than one judge must designate the numbered post for which they are a candidate.

Plaintiffs contend that the at-large, numbered position election system for trail judges dilutes black voting strength in violation of Section 2 of the Voting Rights Act in ten circuits and in four multidistrict judge districts. Plaintiffs also claim that the numbered place feature of the elections has been maintained for racially inspired reasons and has a discriminatory effect, thus violating the Fourteenth and Fifteenth Amendments of the Constitution of the United States.

Section 2 of the Voting Rights Act, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f) (2) of this title, as provided in subsection 9 (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision, is one circumstance which may be considered. PROVIDED, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

BACKGROUND OF PRESENT CHALLENGE

In *Thornburgh vs Gingles,* 478 U.S. 30 (1986), the Supreme Court looked at a challenged redistricting plan for the election of state legislators in North Carolina. It held that in order to prove a violation of amended Section 2 of the Voting Rights Act on the basis of at-large elections, a minority group would be required to show: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) that the minority possesses political cohesion; (3) that the majority group votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

If plaintiffs are successful in proving the three prerequisites, the Supreme Court has directed that the court evaluate the "totality of circumstances," based upon a

practical evaluation of the past and present realities to determine whether the political process is equally open to minority voters. *Gingles*, 478 U.S. at 79.

As already noted, courts and judges were divided as to whether amended Section 2 of the Voting Rights Act applied to judicial elections. In two cases decided on the same day, June 20, 1991, *Chisom v. Roemer*, ____ U.S. ____, 111 S. Ct. 2354 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, ____ U.S. ____, 111 S. Ct. 2376 (1991), the Supreme Court rejected the contention that judicial elections were exempt from the commands of Section 2. In both cases, however, the Court pointed out the importance of considering in the "totality of circumstances" the interest of the state in its determination of its election system for judges. In *Chisom*, the Supreme Court stated that it did "not address any question concerning the elements that must be proved to establish a violation of the Act or the remedy that might be appropriate to redress a violation if proved." With clear prophecy, the Supreme Court in *Chisom* said: "Even if serious problems lie ahead in applying the 'totality of circumstances' described in § 2(b), that task, difficult as it may prove to be" must be attempted to carry out the mandate of the broadly worded statute. *Id.* at 2368. At this time, therefore, the Supreme Court has not attempted to guide trial courts in how to evaluate the circumstances, or what remedy is appropriate in judicial elections.

The task of determining whether the prerequisites for a violation of the Voting Rights Act are present where the challenged elections are for legislative positions or city or county governing bodies is far easier than where the challenge is to the election of judges, and the task of

fashioning an appropriate remedy is also different and far more difficult. For example, it can be presumed that in a legislative election there are large numbers of potential candidates from minority citizens as well as majority. Since only lawyers are eligible to serve as judges, the number of eligible lawyers is a factor that must be considered. Moreover, trial judges essentially make their decisions alone. Where judges are elected from districts which have been crafted to contain a high percentage of blacks to assure the election of black candidates (plaintiffs' expert testified that sixty-five percent black population is necessary), minority interests will have far less impact in the majority of judicial elections because black voters within the crafted district will be participating in the election of only the judge or judges elected in such district.

The volume of cases is also an appropriate consideration in determining the size of circuits, not merely the number of voters in the circuit. The Supreme Court has clearly held that the one-man, one-vote analysis does not apply to judicial elections, *Wells v. Edwards*, 409 U.S. 1095 (1973); *Chisom*, 111 S. Ct. 2354.

A variety of views has been expressed by the Supreme Court Justices as how to decide whether a violation of Section 2 has occurred in legislative elections. Justice Brennan, writing the plurality opinion of the Court, stated:

> "First, both the language of Section 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate per se is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group 'have less opportuni-

> ty than other members of the electorate to ... elect representatives *of their choice.*' " (Italics in the opinion of the Court).

Gingles, 478 U.S. at 67.

Justice O'Connor and Justice White wrote of their disagreement with Justice Brennan that the race of the candidate for legislative office is per se irrelevant in identifying racial or polarized voting conflicts. Justice O'Connor, in an opinion joined in by Chief Justice Burger, Justice Powell and Justice Rehnquist, stated:

> "...In my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political process generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred candidates to an extent that consistently assures their defeat is entitled to significant weight ..."

Gingles, 478 U.S. at 105.

With the bare bones guidance of the statute and the prophecy that the task would be difficult, this Court will examine the "totality of circumstances" to determine whether there is such polarized voting in Alabama in judicial elections that blacks are denied equal opportunity to elect judges preferred by blacks in the challenged circuits and districts in violation of the Voting Rights Act.

THE GINGLES TEST

As to the first of the three threshold questions whether the minority group is sufficiently large and geographically compact to constitute a majority in a single

member district, defendants concede that such a showing has been made in all the circuits except the Seventh, and in each of the four challenged districts.

As to the second prerequisite whether there is sufficient political cohesion of the minority, plaintiffs have fully established a cohesion of the black vote.

The third test requires a determination of whether there is polarized voting so that minorities have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Defendants contend that in determining whether plaintiffs have met this test, the court should look at judicial elections and should consider both white on white judicial elections and black on white judicial elections. Plaintiffs contend that the Court should give weight only to elections where blacks are candidates, and the consideration of such elections should not be limited to judicial elections. Plaintiffs would give no weight to elections where no blacks are candidates. The Court is of the opinion that greater weight should be given to judicial elections, *Williams v. State Bd. of Elections*, 696 F. Supp. 1574, 1580 (N.D. Ill. 1988), and white on black judicial elections, but this court will also consider political races generally – white on black and white on white – in seeking to determine the question of whether the political process is open to minority voters. *See City of Carrollton Branch of NAACP v. Stallings*, 829 F. 2d 1547, 1557-1558 (11th Cir. 1987), *cert. denied* 485 U.S. 936 (1988). The Court must keep in mind the mandate of the statute that Section 2 does not require that minorities be given equal opportunity to elect minority candidates, but that they be given equal opportunity to "elect representatives of their choice." *See Sanchez v. Bond*, 875 F. 2d 1488, 1495 (10th Cir. 1989).

Gingles makes clear that one must examine this question on the basis of the individual challenged circuits and districts. *Gingles*, 478 U.S. at 79. However, before analyzing the evidence in the specific challenged circuits and districts, the Court will make some findings which are common to all of the challenged circuits and districts.

TOTALITY OF CIRCUMSTANCES

HISTORY OF PAST DISCRIMINATION AND CONTEMPORARY STATUS

Alabama has a history of discrimination and disenfranchisement of blacks. Plaintiffs correctly point out that blacks were not admitted to the only accredited law school in the state until the late 1960s. Currently, however, blacks are registered to vote in Alabama in approximately the same proportion as whites; in some counties blacks are actually registered in larger percentages than whites. There are more black officeholders in Alabama than in any other state in the United States. The University of Alabama Law School and Cumberland Law School, the largest private law school in Alabama, routinely admit black students and have done so for twenty years or more.

Some evidence of racial appeals in judicial races was presented. One such subtle racial appeal was in the Democratic Party primary in 1982 which involved a newspaper ad run by a white candidate contrasting the pictures of the white candidate and Justice Adams. The appeal was ineffective as Justice Adams was the successful candidate. In the Twentieth Circuit (Mobile), the white candidate in the Democratic primary in the 1990

district judge race made a racial appeal intended to work against Judge Thomas, a black. The tactics in both races were condemned, and Judge Thomas credited his opponent's racial appeal with causing a backlash against the white candidate which aided his election (Depo. of Judge Thomas, Defts' Ex. 52).

The Alabama Democratic Congress has been for years a very effective black political organization which has had a high degree of success in recruiting black candidates and supporting their efforts. It has also been very active in choosing between white candidates and effectively supporting the white candidate so chosen. More recently, the Alabama New South Coalition and other groups have also worked effectively in recruiting and supporting black candidates for public office, and in choosing between white candidates.

TESTIMONY OF EXPERTS REGARDING POLARIZED VOTING

Dr. Allan Lichtman, plaintiffs' expert, drew his conclusions of racially polarized voting from all kinds of elections where blacks were opposed by white candidates. His analysis was not confined to judicial elections. He found that in analyzing nearly three hundred elections covering some twenty different public offices during a ten-year period, black voters generally lined up very strongly behind black candidates, whereas white voters generally lined up very strongly behind white candidates. Dr. Lichtman's findings are shown in Defts' Exh. 99 as follows:

BLACK COHESION AND WHITE CROSSOVER: 1980s ELECTIONS

Circuit	Black Cohesion %	White Crossover %
4th	85	15
5th	74	21
6th	76	20
7th	79	25
10th	88	22
13th	77	20
15th	70	22
20th	73	20
23rd	84	22
26th	73	16

This Court finds that Dr. Lichtman's analysis is flawed for at least three reasons. First, Dr. Lichtman analyzed only the elections where a black candidate was in the race. This does not accord with the expressed view of any Supreme Court Justice. This Court has already discussed the view of Justice Brennan in writing the plurality opinion in *Gingles*, 478 U.S. 30, in which he writes that the race of the candidate is irrelevant. This Court has also discussed the view of Justice White and Justice O'Connor joined by Chief Justice Burger, Justice Powell and Justice Rehnquist, that the race of the candidate is not irrelevant. No Justice has suggested that only black on white elections are relevant. Justice Stevens in *Chisom v. Roemer*, 111 S. Ct. at 2364, stated:

> Any abridgement of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election. As the statute is written, however, the inability to elect representa-

> tives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process.

It is quite a leap from these views of the Justices to that of plaintiffs that the only elections which have any significance are those involving black candidates. Dr. Lichtman's analysis examining only the degree of success of black candidates does not tell us whether blacks have the ability to influence the outcome of the great majority of elections which are those where whites oppose whites.

Second, Dr. Lichtman's analysis is flawed because it fails to recognize that voting polarization in judicial elections is in no way comparable to the races analyzed by Dr. Lichtman. For example, a lawyer and justice of distinction on the Alabama Supreme Court, Justice Oscar Adams, a black, has served on the Supreme Court of Alabama from his appointment by the Governor in 1980 to the present. Justice Adams, called by the plaintiffs, testified that there were "headwinds" in Alabama to the election of black officials and judges. Since Justice Adams' appointment by the Governor, however, he has won elections to the Supreme Court of Alabama in statewide races against well-known white opponents in both the Democratic primary and the general election in 1982 and 1988.

Plaintiffs discount the election successes of Justice Adams because he did not reach the Supreme Court initially by an election but by appointment of the Governor. Plaintiffs reasonably argue that without the mantle of incumbency, Justice Adams or other blacks would not have succeeded in being elected, and indeed would not

have even offered themselves in a costly election contest with the perceived likelihood that they would not have succeeded. However, Justice Adams is not a rarity in reaching his judgeship by appointment. Over two-thirds of the sitting circuit judges – seventy-two of one hundred six – who came to the circuit court in the challenged circuits between 1978 and 1991 were appointed. *See* Defts Exh. 83. District judges also commonly arrive to their judgeships by appointment. Defts' Exh. 84. As with Justice Adams, these judges, white and black, who are so appointed, are customarily reelected.

The consistent election victories of Justice Adams are not unique as will be discussed in the specific circuits where blacks have been elected again and again in circuit and district court races.

Third, the analysis by Dr. Lichtman does not take into consideration the fact that the current black circuit judges, all of whom reached the bench by appointment, have with one exception been reelected without opposition. Only Judge cook in the Bessemer Division of the Tenth Circuit had a contested election. He was opposed by a white opponent shortly after his appointment in 1981. He succeeded in defeating his white opponent.

Although courts have suggested caution in considering elections where candidates run unopposed, *Gingles*, 478 U.S. at 57, this does not mean that such elections are irrelevant. In holding that the success of minority candidates in unopposed elections is a factor to be considered, the court in *Sanchez v. Bond*, 875 F. 2d 1488, 1494 (10th Cir. 1989) stated: "There is an ... inference that if an Hispanic is unopposed, he is indeed, supported by Anglos or he wouldn't be unopposed." Black judges who have not drawn opposition have uniformly had the support of the bar as well as their judicial colleagues,

and almost without exception have been elected.

Dr. Ronald Webber, defendants' expert, analyzed all *judicial* elections from the time of the enactment of the judicial article, starting his analysis in 1976. He found that in seventy-six percent of circuit judge elections, the black preferred candidate won, and the black preferred candidate won in seventy-seven percent of the district court elections. In state judicial elections, the black preferred candidate won eighty-three percent of the time. These judicial races include white against black races and white against white races. The white against black races are discussed later when the challenged circuits are considered separately.[1]

Because of the high degree of cohesion of the black vote in Alabama, it would be very difficult for a white candidate in a white against white race to be successful without substantial support of black voters. Indeed, in at least two judicial elections where the black political organization endorsed a white candidate, the white candidate received a majority of the black vote even though his opposition was a black. (Judge Owens, an incumbent black, was defeated in 1986 in the general election in the Seventh Circuit when he switched parties and ran as a Republican for a district judge position. In 1980, he had been elected over a white opponent for the district judgeship.) In the Thirteenth Circuit, Ms. Smith lost in a 1980 district court election to a white even though she was the black preferred candidate and had the endorsement of the Alabama Democratic Conference, but in 1986 she ran as an independent; the Alabama Democratic Conference in 1986 endorsed her white opponent and he received a substantial majority of the black vote. Plaintiffs correctly stress the power of incumbency in judicial elections, but in the 1990 circuit judge

[1] Dr. Webber determined that a candidate was a black preferred candidate if he received more than fifty percent of the black vote.

election in the Fifteenth Circuit, the incumbent white judge was defeated by his white opponent even though the incumbent received sixty percent of the white vote. His opponent was elected by an overwhelming percentage of the black votes.

PROPORTION OF BLACK JUDGES TO BLACK LAWYERS

Without question, the number of blacks serving in judicial positions in Alabama is far less proportionately than the number of blacks in the general population. On the other hand, blacks still make up a very small percentage of the licensed attorneys in Alabama, the group from which all judges must come. Of more than nine thousand six hundred licensed lawyers in Alabama, only two hundred ninety-five black lawyers have ever been licensed in Alabama, and one hundred three of these black lawyers were admitted between 1986 and 1991. Since most judges have practiced law for several years before seeking a judgeship, the actual pool of black lawyers is even smaller than the raw numbers would indicate.

In the challenged circuits and districts where there are no black judges, the number of black lawyers is so small that the absence of a black judge would not cause one to conclude that the result was due to discrimination. The three circuits in which there is at least one black circuit judge – the Tenth, Thirteenth and Fifteenth – are also the circuits with the most judgeships and with the most black attorneys. In each of these three circuits, the number of black judges substantially exceeds the proportion of black lawyers to white. For example, the Tenth Judicial Circuit has three black circuit judges out

of twenty-four. It has no black district judges out of eleven. The proportionate number of black trial judges – circuit and district – is 8.6 percent. Only 3.48 percent of the lawyers are black.

In the Thirteenth Circuit, black lawyers make up 2.1 percent of the licensed attorneys. Of fourteen trial judges, the Thirteenth Circuit has one black circuit judge and one black district judge. Black lawyers have 14.3 percent of the judicial positions, but only 2.1 percent of the pool from which judicial offices will be filled.

In the Fifteenth Circuit, of seven circuit judges, one is black. None of the three district judges is black. The proportion of black lawyers on the trial bench, therefore, is 10 percent, whereas black attorneys make up only 5 percent of the attorneys in this circuit.

Plaintiffs rely on an article cited by one of their experts that "the percentage of black lawyers in a state does not have a statistically significant effect on the probability of blacks serving on the trial bench." Plaintiffs argue that what matters is whether lawyers are appointed or elected. (Pltfs' brief, p. 28). This is an amazing conclusion when applied to the undisputed evidence in this case.

Of the nineteen counties composing the ten challenged circuits, seven counties have not one black lawyer. Surely, it is reasonable to attribute the absence of a black judge in these counties to the absence of any black lawyer, rather than to polarized voting. There are only two lawyers in private practice in the entire Twentieth Circuit and one of them has been practicing only a year. In the Twenty-sixth Circuit, only two black lawyers reside in the circuit. In the Twenty-Third Circuit, there are only three black lawyers in private practice out of some four hundred fifty lawyers. In the Seventh

Circuit, there are only six black lawyers of some one hundred forty-six lawyers.

In a circuit such as the Tenth which has one hundred five black lawyers out of over three thousand, the disproportionate number of black lawyers has far less relevance, but plaintiffs making the amazing argument on the evidence in this case that the number of black lawyers in these ten circuits is irrelevant to the number of lawyers who are serving as trial judges.

In Perry County, which is one of the three counties in the challenged circuits with the highest percentage of black population (64 percent), there is a white district judge, although there are two black lawyers. This is evidence that redistricting, even with nearly 65 percent black population, does not assure black election for any number of reasons.

In employment discrimination cases, it has been held repeatedly that to determine discriminatory exclusion, unskilled positions are compared to a different statistical pool than jobs requiring special training. When "special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Hazlewood School Dist. v. United States*, 433 U.S. 299, 307-308 n. 13 (1977); *see also Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620 (1974); J.A. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989); *Peightal v. Metropolitan Dade County*, 940 F. 2d 1394, 1404 (11th Cir. 1991).

Because blacks have been elected to judgeships in greater numbers than would be the case if there were strict proportionality between blacks and whites eligible for election does not preclude a finding that blacks have

not been able substantially to influence elections. The test articulated by Justice Brennan in *Gingles*, which directs that one look beyond the single question of the degree of success of black candidates is particularly required where the minority candidate pool is so small.

OTHER ALLEGED DISCRIMINATORY VOTING PRACTICES

1. SIZE OF CHALLENGED CIRCUITS

Plaintiffs contend that the size of the circuits works against the election of black candidates because the circuits are so large that it is expensive to mount a campaign, and blacks are disadvantaged because they lack adequate financial resources. However, except for the Fourth, Fifth, Seventh and Twentieth Circuits, all the challenged circuits and districts are single county. Moreover, strong black political organizations have been effective in recruiting and assisting black candidates in political races.

2. MAJORITY VOTE AND NUMBERED PLACE REQUIREMENTS

There was no evidence that the requirement that a candidate receive a majority of the vote operated in a discriminatory fashion. Although the numbered place requirement in judicial elections came under challenge by the plaintiffs, this Court finds that the numbered place requirement for judges is not based on any discriminatory reason. Aside from the fact that Alabama has elected its judges from designated places at least for the past sixty-five years, it is difficult for the Court to conceive of a more inefficient and damaging way of

electing judges than to have them all run in competition with each other. If this system of electing judges is in use anywhere, such evidence was not presented at this trial.

Certainly, Alabama should be allowed to have a system for electing judges where they do not compete against each other at election time. There is a problem now of getting the best qualified lawyers to seek judgeships. This problem would be compounded if potential judicial candidates realized that at election time all judges would have as opponents their colleagues on the bench. Such a system would hardly tend to cause harmonious collegiality on the bench, and the heightened probability that one would have the costly task of running for reelection at the conclusion of each term would make seeking judicial office substantially less attractive.

PROPOSED RECONFIGURATION OF CERTAIN CIRCUITS AND DISTRICTS

In the Fourth and Fifth Circuits, plaintiffs contend that the present makeup of the counties within these circuits results in the dilution of black voting strength. There is no claim that these circuits as originally drawn were so drawn with any racially discriminatory intent. The only reason for the reconfiguration proposed by the plaintiffs would be to create "safe" black districts and "safe" judgeships for black lawyers. It seems questionable that the reconfiguration which plaintiffs propose would actually achieve their purpose. Two of the proposed majority black circuits would have only 51 and 54 percent black voting strength, respectively, after such reconfiguration. The Fourth Circuit already has over 49 percent black voting strength. The best that plaintiffs' expert could do with his districting the Seventh Circuit

was less than 51 percent black. And as noted, plaintiffs' expert, Dr. Lichtman, testified that taking likely turnout into account, a black candidate would need 65 percent black voting population to be expected to win. Whether 51 and 54 percent reconfiguration of circuits or redistricting to provide 50 percent black voting strength would be enough to insure a black's election is questionable, if what is being sought is some guarantee that a black candidate would win or even that a black candidate from the small number in such circuits would seek election. For example, in the Twenty-Sixth Circuit, plaintiffs' witness, Judge Bellamy, testified that only he and one other black lawyer reside in the circuit, and Judge Bellamy is the municipal judge. Mr. Newman, a black attorney, testified that there are only two black attorneys in private practice in the Twentieth Circuit.

The Fourth Judicial Circuit, which is one of the circuits which plaintiffs propose to have realigned, contains five counties and two circuit judges based on caseload and other relevant factors. As noted, the Fourth Circuit is predominantly black with the voting age population being almost exactly fifty-fifty between white and black populations. The Fifth Judicial Circuit, which plaintiffs also propose to realign, is composed of four counties and three circuit judges. In three of the four counties, as the circuit is presently constituted, there is no black lawyer.

NOMINATING COMMISSION SYSTEM

In four of the ten circuits, the Sixth, the Tenth, the Thirteenth, and the Twenty-Third within which the cities of Tuscaloosa, Birmingham, Mobile and Huntsville are located, respectively, the circuits have by legislative

statute a procedure for filling judicial vacancies. These four circuits have forty-five of the sixty-six circuit judgeships in the challenged circuits. When a vacancy occurs in one of these circuits with respect to circuit or district judges, a judicial nominating commission composed of five members from the Bar, Legislature, and the public at large select three lawyers to certify to the Governor. In three of these four circuits the Governor is required to make his selection from the persons so certified. In the other circuit he is not so bound. This relatively newly adopted procedure has resulted in the certification of several black lawyers by nominating commissions and the selection of several black lawyers from those so certified.

Any lawyer – white or black – who received certification from the nominating commission and is chosen by the Governor has had great success in winning subsequent elections, most often without a contest. This procedure acts as a form of merit system for the appointment of the judiciary in those circuits where it is utilized. The Tenth Circuit with one hundred five black lawyers out of approximately three thousand had two of its three black circuit judges come to the bench through this nominating process.

STATE'S INTERESTS

1. JUDGE'S JURISDICTION AND ELECTORATE CO-EXTENSIVE

Alabama has a strong interest in having judges' jurisdiction correspond with their electorate. Several of the judges testified to the serious disadvantage of having the electorate of the judge smaller than the electorate in the judge's jurisdiction. Concerns were expressed that

there would be a perception of unfairness if a litigate from the judge's electoral district was opposed by a litigant from outside the district. In all events, there is a strong state interest in having the entire electorate in the circuit have a voice in the judges serving that circuit.

If a district is drawn to get a majority of black voters within a circuit, those black voters not only will have their choice of candidates within the district narrowly restricted, they will also be sacrificing another extremely valuable political right – the right to vote for all of the judges who will be serving as judges in the circuit wherein they live. As Judge Higginbotham stated in *League of United Latin American Citizens Council v. Clements*, 914 F. 2d 620, 649-50 (5th Cir. 1990):

> These judges all hear and decide their own docket of cases, and their character as single officer-holders instead of members of a multi-member body is emphasized by the problems inherent in attempting to break the linkage of jurisdiction and elective base. To do so may well lessen minority influence instead of increase it, surely not what Congress intended when it enacted the Voting Rights Act or its amendments. The current system of electing district judges at least permits voters to vote for each and every judicial position within a given district, generally a county. It is more likely, therefore, that minority voters will have some influence on the election of each judge. Under the district court's order, each voter would have the opportunity to vote for only one judge in each district, the judge whose position was assigned to the subdivision. ... the great majority of district judges will be elected from new voting subdistricts with negligible minority populations

and, consequently, negligible minority political influence on the outcome of those elections."

Judges testifying in the instant case also expressed the view that in some cases where feelings ran high, it would be a distinct advantage to the judge to have the electorate from the whole circuit rather than by smaller districts.

It would be feasible in certain circuits to have judges run from districts within the circuit. However, this Court finds that the present system of requiring judges to run from the entire area which they would serve, if elected is not racially inspired. Further, the Court finds that a system in which all judges within a circuit are elected by all the voters over which the judge's court has jurisdiction is the logical way to elect judges and has been the chosen method in Alabama for as long as judges have been elected, over a hundred years.

Although one or more of plaintiffs' witnesses expressed the commendable view that no judge would be influenced in his or her decision by the views of his or her constituency, several of the judges who testified spoke of the difficulty for the judge in some cases if he or she had to depend for reelection on a smaller district rather than on the entire circuit.

As the Court said in *Chisom*, 111 S. Ct. at 2367, when a state decides to elect its judges and to compel judicial candidates to vie for popular support as other political candidates do, there is a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." The *Chisom* Court continued, stating that this tension "cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.

When each of several members of a court must be a resident of a separate district, and must be elected by the voters of that district, it seems both reasonable and realistic to characterize the winners as representative of that district." *Chisom*, 111 S. Ct. at 2367. In other words, it is primarily because judges who run for political office are subject to the realities of the world of practical politics that they are subject to Section 2 of the Voting Rights Act. This should not be ignored when a court is considering the "totality of circumstances" which give the state a real interest in having judges elected by all voters in the circuit served by the judge.

2. SIZE OF POOL FOR SELECTION OF JUDGES

Before analyzing the alleged impairment of black voting strength in the individual circuits, this Court will make one further general observation.

In a number of circuits which plaintiffs ask be divided into districts, the number of black lawyers residing in the circuit is as few as two, five, six, and twelve. Only the Tenth Circuit, Jefferson County, has as many as a hundred black lawyers. Jefferson has one hundred five. Montgomery has fifty-six and no other circuit has more than twenty.

If the purpose of creating districts within the circuit is to get black lawyers elected judges, there is a compelling state interest in having the pool of black lawyers large enough to give the voters a pool of reasonable size from which to make a selection. Whatever one's race, it is vitally important that the pool from which voters in the circuit must choose be large enough so that a choice can be made from qualified lawyers who are willing to serve as judges. If the purpose of redistricting is merely

to give blacks in a newly created district an opportunity to have a significant voice in the political process, as has already been stated, blacks in Alabama at the present time very definitely have a powerful political voice in the election of all judges in the challenged circuits.

ANALYSIS AS TO SPECIFIC CIRCUITS AND DISTRICTS

1. FOURTH JUDICIAL CIRCUIT

The Fourth Circuit consists of five counties: Wilcox, Dallas, Hale, Perry and Bibb. It has only two circuit judges, both of whom are white. Both came to the bench originally by appointment. Of the five district judges, two are black. In two of the five counties, there are no black lawyers from which to elect a district judge. The Fourth Circuit is predominantly black, and is divided almost fifty-fifty percent between black and white in voting age population. The voter registration rate is approximately the same among whites and blacks in the five counties. No black lawyer has ever chosen to run for circuit judge. Of the two contested judicial elections within the circuit since 1976, the candidate preferred by black voters won one and lost one. Justice Oscar Adams carried the circuit in each of his three elections against white opponents. In statewide judicial elections, the candidate preferred by the circuit's black voters won in the circuit eighty-eight percent of the time.

There are only fifteen black lawyers in all five counties; eleven of the fifteen are in Dallas County. The remaining four counties average only one black lawyer per county. The fifteen black lawyers represent 16.3 percent of the total number of lawyers in the Fourth Circuit. Black judges occupy two of the total of seven judgeships

(28.6 percent). (The pool of all lawyers in the Fourth Circuit is only ninety-two, which is restrictive enough without a further reduction.)

2. FIFTH JUDICIAL CIRCUIT

The Fifth Circuit is composed of four counties: Tallapoosa, Macon, Chambers and Randolph. It has three white circuit judges. No black candidate has run for circuit judge. Two of the three judges presently on the bench were initially appointed. For the four contested circuit judge races from 1976 to 1990, the candidate preferred by black voters has prevailed in two of the four. On two of the four occasions, the winner got a larger proportion of the black vote than the white vote. In twenty-six statewide judicial elections, the candidate preferred by blacks in the circuit has won eighty-five percent of the time.

Although the population is 41 percent black, only thirteen of eighty-nine lawyers (14.6 percent) are black. Judge Fort is the black district judge in Macon County. (Judge Fort is also the past president of the District Judges Association in Alabama and the Juvenile Judges Association in Alabama.) There are no black lawyers in the other three counties in the circuit; thus no black lawyers are in the pool from which three district judges are selected to serve in three of the counties. Nevertheless, black lawyers comprise 14.6 percent of the lawyers and hold 14.3 percent of the judgeships in the circuit. There is little difference in black and white registration rates in the counties in the circuit. Voters in the Fifth Circuit as in the Fourth are restricted in their election choices by the presence of only eighty-nine lawyers in the entire circuit.

3. SIXTH JUDICIAL CIRCUIT

The Sixth Circuit is composed of one county, Tuscaloosa, and has a 1990 black voting age population of about 23 percent. Five incumbent circuit judges are white. Only twelve lawyers of the circuit's three hundred sixty-nine are black. Four of the six judges assuming the bench since 1978 were appointed by the governor. As previously mentioned, Tuscaloosa is now one of the circuits which operates with a judicial nominating commission. A black attorney has twice been among the group of three lawyers nominated by the commission to fill a vacancy on the court. The black attorney is a Democrat and he was not appointed by Republican Governor Hunt. In the eight contested trial judge elections within the Sixth Circuit since 1976, none involved a black candidate. In four of the eight contested elections, the candidate preferred by black voters prevailed. The candidate preferred by blacks in statewide judicial elections prevailed in the circuit twenty-one out of twenty-two times, including all of Justice Adams' contests.

Plaintiffs have suggested that a district be created in Tuscaloosa to guarantee that at least one-fifth of the circuit judges would be elected from 3.25 percent of the lawyers in the circuit.

Presiding Judge Conger stressed the importance of the state's interest in electing its judges from the entire circuit. He testified to his experience of having a section of the circuit strongly opposed to him after a very unpopular decision in that part of the circuit, but support circuitwide enabled him to be reelected. He expressed the view that judges who have to run for reelection need to run circuitwide. He was particularly concerned that the juvenile and family court judge

would be elected from the entire circuit. Charles Steele, a black and a named plaintiff in this case, who is a city councilman elected from a district, testified to his belief that he could be elected citywide in predominately white Tuscaloosa.

4. SEVENTH JUDICIAL CIRCUIT

The Seventh Circuit is made up of Calhoun and Cleburne Counties. The Seventh Circuit has four white circuit judges. Of the five judges who assumed the bench since 1978 three were appointed. In five of eight circuit judge elections, the candidate preferred by black voters won. In the only district judge election conducted from the two county election districts, the candidate preferred by blacks won. In statewide judicial elections, the candidate preferred by black voters won in the circuit seventy-six percent of the time.

In 1980, a black attorney, Mr. Nathaniel Owens, was elected a district judge from the Calhoun-Cleburne district against a white opponent. The district has only a 15.64 percent black voter registration. Prior to Judge Owens' reelection bid in 1986, Judge Owens changed his party allegiance to the Republican Party. Primarily because of this conversion, Judge Owens lost the important endorsement of the Alabama Democratic Conference and thereby the bulk of the black vote went to his successful white Democratic opponent.

There are only six black lawyers in the Seventh Circuit; none in Cleburne County. Black lawyers make up four percent of the one hundred forty-six lawyers in the circuit.

Judge Street testified that he has encouraged qualified black lawyers to run for judgeships, but his efforts

have been unsuccessful because the lawyers are well-situated in private practice. This testimony highlights the further fact which runs through all of the challenged circuits, i.e., that one cannot assume that all lawyers or even a large proportion of lawyers – white or black – desire to serve as a judge or to run for this elected office.

Judge Street also said that one of the four circuit judges is a family court judge who performs no other duties than those of the family court. This fact suggests that in order to establish their claim plaintiffs should do so on the basis of three circuit judges, not four. As will be shown, plaintiffs clearly could not prevail and get a majority district if only three circuit judgeships were considered.

The Seventh Circuit was the one circuit where defendants contend that the minority population is not sufficiently large and geographically compact to constitute a majority in a single member district even if the Seventh Circuit is considered as having four circuit judges. *Gingles* requires that any created district be sufficiently large and geographically compact to constitute a majority in the single member district. *See Gingles*, 478 U.S. at 50.

Plaintiffs' expert testified that the highest black voter registration percentage which he could achieve in a single member district is 50.18. This district which plaintiffs propose in a *four district* plan is a district with convoluted lines which run through Calhoun County, crossing into Cleburne and takes in part of four different municipalities.

Since plaintiffs' expert, Dr. Lichtman, testified that in order to reasonably assure the election of a black, a district should have approximately 65 percent of its population black, such a district of 50.18 percent black would likely not accomplish any desired result for plaintiffs

and would have the disadvantage for blacks which was stated by Judge Higginbotham. If this Court required such a gerrymandering of a district in the Seventh Judicial Circuit, it would be doing so in the teeth of the provision in the statute itself that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion to the population." This Court does not know what meaning would be given this proviso if the gerrymandering sought in judicial circuit Seven were required.

5. TENTH JUDICIAL CIRCUIT

The Tenth Circuit has twenty-four circuit judges and eleven district judges. Three of the circuit judges and three of the district judges serve a separate division designated as the Bessemer Division. By statute, primary elections are conducted at the division level but general elections are conducted from the county at large.

Of the twenty-four circuit judges, three are black. Each of the three was appointed. Judge Cook of the Bessemer Division was appointed in 1981 after serving on the district bench in Bessemer following his election to the district bench in 1976. Judge Pearson was appointed in the Birmingham Division in 1984 and was elected in 1986 without opposition. Judge Smitherman was appointed in Birmingham in 1991. There are no black district judges. Three of the total of thirty-five trial judges (8.6 percent) are black. By comparison, black lawyers make up only 3.8 percent of the lawyers in the Tenth Circuit. Plaintiffs seek to have approximately 33 percent of the judges come from a court-ordered district although black lawyers make up less than 4 percent of the lawyers in Jefferson County.

In twenty-one of twenty-three (91 percent), contested circuit court elections, and in nine of eleven (82 percent) contested district court elections, the candidate preferred by black voters was elected. In those thirty-four elections, the choice of black voters prevailed in thirteen of sixteen elections in which white voters and black voters differed in their preferences. In the twenty-six statewide judicial elections since 1976, a candidate preferred by black voters has won on each occasion, including Justice Adams' three elections.

As previously noted, Jefferson County, the Tenth Circuit, is one of those circuits where a judicial nominating commission is in operation. Between 1978 and 1991, fifteen of nineteen new circuit judges assumed the bench by appointment, and eight of twelve new district judges came to the bench through the same route. The bench and bar through the nominating commission process have played a prominent role in recommending qualified attorneys to the Governor for nomination to the bench. Both Judge Pearson and Judge Smitherman were recommended to the Governor through the nominating commission. Two of the five persons presently serving on the nominating commission are black. A black lawyer has served as president of the Birmingham Bar, the largest circuit bar in Alabama.

Plaintiffs rely heavily on two 1988 district court elections where black Democratic candidates Judge Anthony and Mr. Chambliss were defeated by white Republicans.[2] Defendants point to several factors other than race which played a prominent role in the success of the white Republicans. The most revealing statistic concerning these two races is that the black Democratic judicial candidates each received approximately 24 per-

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[2] Judge Anthony is now a municipal court judge in the city of Birmingham.

cent of the white vote while Governor Dukakis got only 17 percent of the white vote in Jefferson County. The top white Democratic vote getter in Jefferson County's judicial races in 1988 received less than 40 percent of the white vote in the circuit. The 1988 races clearly had results which were dictated by the strong preference of a majority of voters in Jefferson County for Republican candidates rather than Democratic. This preference obviously was not restricted to white Republicans who were running against black Democrats.

After Judge Cook was appointed a circuit judge in 1981, he faced an election in 1982. He won the election over a white opponent and was unopposed in the general election. Judge Cook had no opposition in 1988.

If the Bessemer division is considered a separate election district, not only has Judge Cook repeatedly won elections, but also candidates Judge Anthony and Mr. Chambliss have won the nomination of the Democratic Party following their election in the Democratic primary, and each of them won a majority of the votes in the general election in the Bessemer division. Based on the success of Judge Anthony and Mr. Chambliss in their races in the Bessemer division compared to their defeats in 1988 in the circuitwide general elections, it is predictable that black candidates for judgeships in the Bessemer division would fare better if the general election were also by division. It appears to be something of an accident that the races are not so conducted uniformly in both primary and general elections. The racial composition of the Birmingham and Bessemer division is approximately the same, however, 30 percent black in the Birmingham divisions and 35 percent black in the Bessemer division. Party preference rather than race is the apparent difference in the two divisions. Since blacks

usually run as Democrats, they would probably do better because of their political allegiance by running in only the Bessemer division. But this is hardly what Section 2 was enacted to accomplish.

Justice Adams has won handily in the Bessemer Division in each of his elections.

6. THIRTEENTH JUDICIAL CIRCUIT (MOBILE)

The Thirteenth Circuit has a black circuit judge, Judge Kennedy, and a black district judge, Judge Thomas. Judge Kennedy was appointed by the Governor in 1979 and has twice been elected without opposition. Judge Thomas was appointed in March of 1990 to fill a vacancy, and immediately had to stand for election. He was elected over two formidable white opponents.

The two black judges on the trial bench in the Thirteenth Judicial Circuit out of fourteen trial judges means that black lawyers occupy 14.3 percent of the trial bench in the Thirteenth Circuit although they represent only 2.1 percent of the lawyers in the Circuit. Of nine hundred thirty-four lawyers in the Thirteenth Circuit, only twenty are black. Thus ten percent of the black lawyers are trial judges and less than two percent of the white lawyers are judges. For this Court to require the creation of a predominantly black district from which 25 to 30 percent of the judges in the Thirteenth Circuit would be elected hardly seems necessary to have black lawyers fairly represented on the bench in the Thirteenth Circuit, or to give black voters an effective voice in judicial elections.

Again, although plaintiffs point to the fact that both Judge Kennedy and Judge Thomas initially came to the

bench by appointment, of the six circuit judges in the circuit taking office in the period between 1978 and 1991, all except one were so appointed. The situation with Judge Thomas is also typical in that three of the five district judges during the same period came to the bench by appointment.

Black voters in the Thirteenth Circuit have again been successful in electing their preferred judicial candidates. In the four circuit court elections, the candidate favored by black voters prevailed on each occasion. In district court elections where there have been twelve contested elections, the black preferred candidate has won seventy-five percent of the time. In statewide elections, the Thirteenth Circuit vote has gone to the black preferred candidate eighty-five percent of the time. Justice Adams has carried Mobile County on each of the three times that he has run.

The only black lawyer to lose a judicial election in Mobile County was Ms. Frankie Field Smith, who lost to a white in a district court race in the 1980 Democratic primary runoff and to two whites in a 1986 district court general election. Although Ms. Smith was the black preferred candidate in 1980, she was not in 1986 when she ran as an independent, and her white Democratic opponent got the endorsement of the Alabama Democratic Conference and received a substantial majority of the black vote. Smith's 1986 defeat does not show the powerlessness of black voters; it is another example of the success of the black preferred judicial candidate.

Defendants understandably put significance on the recent election of Judge Thomas to a full term on the district court. Judge Thomas was opposed in the Democratic primary by a well known white lawyer, who was a former legislator and chairman of the Mobile leg-

islative delegation, and with strong family ties throughout Mobile County. Judge Thomas defeated his white opponent by receiving approximately forty percent of the white vote. In the general election, Judge Thomas faced a well known Republican lawyer, and was again successful, receiving approximately forty-four percent of the white vote. significantly, the white Democratic candidate for Governor in that same election received only thirty-five percent of the white Mobile vote against his white Republican opponent. Judge Thomas testified that his vigorous campaigning in white areas was critical to his success.

7. FIFTEENTH JUDICIAL CIRCUIT (MONTGOMERY COUNTY)

While Montgomery has a black voting strength of approximately 38 percent, only 5 percent of the lawyers in the circuit are black. One of the circuit's seven circuit judges is black. None of the three district judges is black. Black representation on the overall trial bench is thus 10 percent.

Judge Price, the black circuit judge, after serving for a number of years in the district attorney's office, was appointed to the circuit bench in 1983, and was elected without opposition to full terms in 1984 and 1990. Once again, Judge Price is among the majority of circuit and district judges in the Fifteenth Circuit who initially reached the bench through the appointment process. Only two of nine trial judges in the 1978-1991 period reached the bench other than by the appointment process.

Black voters in the Fifteenth Circuit have been highly successful in securing election for their preferred can-

didate. In eight of the ten trial judge elections analyzed by Dr. Webber, the black preferred candidate prevailed. Justice Adams carried Montgomery County handily in his three contested elections, and statewide judicial candidates preferred by blacks have won the county vote on twenty-two of twenty-six occasions. Plaintiffs urge that in order to give blacks an opportunity to elect representatives of their choice, this Court should create a district with a substantial black majority in the electorate so that over 40 percent of the circuit judges and 33 percent of the district judges would come from the 5 percent of black lawyers in the circuit. As shown by the statistics, blacks have been successful in getting the candidates of their choice elected in over 75 percent of the contested judicial elections in the Fifteenth Circuit. In no way are they denied equal access to the political process in judicial elections in the Fifteenth Circuit.

Plaintiffs correctly stress the power of incumbency in judicial elections. Judge Phelps testified, however, that in the 1990 election between the Republican incumbent judge and his Democratic opponent, both white, the Republican received sixty percent of the white vote. The Democrat won because he got almost all the black vote. This is further evidence that blacks have full and effective participation in judicial elections.

With such a record of success in all judicial elections, with 10 percent of the trial judges in the Fifteenth Circuit being black although black attorneys make up only 5 percent of the bar, this Court does not believe it was Congressional purpose to require a special district in the Fifteenth Circuit, thereby denying the majority of blacks in the Fifteenth Circuit any voice in the election of trial judges who would be elected outside the newly created district, or if plaintiffs' underlying premise were correct,

thereby denying the minority of whites in the newly created district "equal access to the political process." Polarizing judicial districts by race within circuits clearly would reduce access of minority voters – white and black – in the districts after such court required restructuring.

Plaintiffs' expert, Mr. Jerry Wilson, has proposed a single predominantly black district in the Fifteenth Circuit which would have approximately a 55 percent black majority and which would elect three circuit judges and one district judge. Once again, plaintiffs' expert, Dr. Lichtman, testified that a district is not "safe" for black candidates unless the district has 65 percent black registered voters, but assuming that such newly created district for the purpose of getting more black judges achieved its purpose, the blacks outside the district would have their voting strength substantially diminished, and in actuality so would all blacks as to most of the elected judges.

8. TWENTIETH CIRCUIT

In the Twentieth Circuit, composed of Houston and Henry Counties, there are three white circuit judges. Only five of the one hundred forty-seven lawyers in the circuit are black. All of these reside in Houston County. Of the five black lawyers, only two are in private practice, a husband and wife team. Mr. Newman, the husband in the husband and wife team, testified that his wife has only had active experience as an attorney for about a year. The two district judges are white; however, there are no black lawyers in Henry County, so the district judge in Henry County must come from the very limited number of white lawyers.

Mr. Newman testified that he has not considered applying for appointment or running for the circuit court. He does not think he would be successful.

The black vote is diligently sought by judicial candidates in the Twentieth Circuit. The circuit judge candidate preferred by blacks has been successful in two of the four contested elections since 1976, and the statewide judicial candidate favored by black voters has won the circuit vote seventeen of twenty-six times.

Plaintiffs proposed that a black "safe" district be created so that at least one circuit judge is black. Thus, plaintiffs seek to have one-fourth of the judges come from a pool of only two or five black lawyers in the entire circuit. If judges are to be elected by circuits or districts, the state has a compelling interest that voters have a choice that is not so restricted as would be the case in the Twentieth Circuit.

9. TWENTY-THIRD JUDICIAL CIRCUIT

The Twenty-third Judicial Circuit, which consists of Madison County, has six circuit judges, all of whom are white. Three of the six judges who came to the bench from 1978 to 1991 came by appointment. Of four hundred forty-five lawyers in Madison County, fifteen (3.8%) are black. However, plaintiffs' witness, Mr. Lampley, a black lawyer, testified that only three black lawyers are in private practice in Madison County.

In the few contested judicial elections within the Twenty-third Circuit the candidate preferred by black voters prevailed in three of the three circuit court elections and in four of the six district court elections. In statewide judicial elections, the county vote has gone with the candidate preferred by blacks sixty-five percent

of the time. Justice Adams has carried Madison County except for the 1982 first primary when he finished second in a three man race to a well-known Huntsville lawyer, a past president of the Huntsville bar.

The Twenty-third Circuit is one of the circuits which has a nominating commission system. Mr. Lampley, a black attorney, testified that when he applied for a judgeship to fill a vacancy, he had been practicing law for only three or four years. He acknowledged that the white candidates who have been elected in Madison County usually had black support.

In the one contested district court election involving a black candidate, the white candidate received the co-endorsement of the Alabama Democratic Conference. She had been a lifetime resident of Madison County with strong family connections throughout the county. The testimony was undisputed that she campaigned far more vigorously and with much stronger political connections than her black opponent.

Judge Smith, a circuit judge in Madison County, urged that the county not be districted. With twenty percent of Madison County's population black, presumably Madison County would have one majority black district. This would mean that a black would have a five to one chance that his case would be heard before a white judge for whom the black had no vote. Judge Smith testified that at present blacks are the margin of victory in the Democratic primary. Judge Smith expressed concern as to what such polarization by race would do for fringe groups. He did not see such polarization as a step forward but rather as a step backward for blacks. Their political influence would be lessened, not increased.

10. TWENTY-SIXTH JUDICIAL CIRCUIT

The Twenty-sixth Judicial Circuit is composed of one county, Russell County. Out of fifty-three attorneys who have a practice in Russell county, only four are black. Plaintiffs' witness, Judge Bellamy, one of those black lawyers, who is also a municipal court judge, testified that only two of the four black lawyers actually reside in Russell County.

All judges in Russell County, at least since 1978, have taken the bench by appointment. District Judge Johnson, while acknowledging the importance of incumbency, testified that in his view a black lawyer could win an open seat election in Russell County. Judge Johnson discussed the electoral success which black candidates have had in at large elections in the county, including election to the county school board. Judge Bellamy testified regarding his own election to the county Democratic executive committee over a popular white officeholder, a county commissioner, in a heavily white district.

Judge Bellamy expressed the opinion that the numbered place feature of the election system plays a legitimate role and function in the interest of blacks by minimizing voter confusion.

Blacks constitute 36 percent of the voting population in Russell County. Plaintiffs contend that in order to comply with the Voting Rights Act, this Court should create a single member district to assure that a black candidate would be elected circuit judge and another black candidate would be elected district judge. Not even in *Gingles*, where the Court was considering legislative districting with an unlimited number of minority persons in the pool from which an elected official could come, did the Court suggest any such result. Once again, if

Section 2 of the Voting Rights Act, as amended, is to be construed to require the results sought by plaintiffs in this circuit, what is the meaning of the proviso in the amended section that nothing in the section is to be construed as establishing a right to have members of a protected class elected in numbers equal to their proportion in the population?

SUMMARY REGARDING THE CHALLENGED CIRCUITS AND DISTRICTS

Where blacks presently occupy 7 percent of the trial judgeships in the challenged circuits and districts compared with 3.9 percent of black lawyers in these circuits and districts; where there are no black lawyers in seven counties of the nineteen in the challenged circuits, thus precluding the election of a black to the district court in those counties; where there are increasing numbers of black attorneys, approximately one-third of the black attorneys have been licensed in Alabama within the last five years; where the black minority in Alabama has had increasing political impact in all political contests; where for many years there has been no impediment to black voting in Alabama and blacks and whites are registered in comparable percentages; where blacks have been largely successful in having the candidate of their choice win in contested judicial elections; where in circuits which have two-thirds of the circuit judges there are nominating commissions which have shown a genuine desire to get a judicial appointment for the best qualified attorneys – white or black; where there is a legitimate state interest in having a judge's jurisdiction correspond to his constituency; where the numbered place system appears to this Court to be the only sensible way to con-

duct judicial elections and the state has a compelling interest in continuation of this system; where Alabama's procedure for electing judges at large (one hundred forty-two years) and for numbered places (sixty-five years) was instituted and continued with no racial discriminatory intent; where the size of judicial circuits and districts were established with no racial discriminatory intent and is based on caseload and other legitimate factors; where there is a compelling state interest that the pool of potential candidates be large enough to give voters a reasonable choice, this Court concludes that no violation of the Voting Rights Act has occurred.

In reviewing the Supreme Court opinion in *Chisom*, 111 S. Ct. 2354, the reviewer in the Harvard Law Review wrote: "Judges evaluating a dilution claim should ask whether election schemes, considered as a whole, have reduced the minority vote to an empty formality and prevented minorities from substantially influencing election outcomes. Such an approach would move all minorities closer to the ideal of full and effective participation in the political arena." 105 Harv. L. Rev. 409, 418 (1991). No one could find that election schemes in Alabama have reduced the minority vote to an empty formality or prevented minorities from substantially influencing election outcomes. As one witness after another has testified, the black electorate is decisive in "influencing the outcome" of elections and having their preferred candidate elected. This is a great credit to the sagacity of the black political leadership in Alabama. The action sought by plaintiffs in this case would probably succeed in getting a small increase in the number of blacks elected to judgeships at a cost of diminished black political clout in all other judicial elections. As other judges have stated, the polarization of the black vote in

judicial elections could have the unwanted repercussions discussed by Judge Smith with regard to the Twenty-third Circuit.

During a long part of the history of Alabama, blacks were effectively denied the vote. The Voting Rights Act of 1965 greatly accelerated the growing number of black voters. As the testimony in this case makes clear, for many years there has been no impediment in Alabama to blacks voting. When blacks could not vote in any substantial numbers, the chance of blacks receiving judicial appointment or election was practically non-existent. Their ability to influence elections was also minimal. This is simply no longer remotely the case in Alabama.

It does not require polarization of the races by districts to achieve black influence in the election process of judges. This Court agrees with Judge Smith and others that such polarization on balance could well be a step back in black political influence. *See League of United Latin American Citizens Council v. Clements*, 914 F. 2d 620, 649-50 (5th Cir. 1990).

CHALLENGE AS VIOLATION OF FOURTEENTH AND FIFTEENTH AMENDMENTS

In its amicus brief, the United States supports plaintiffs' challenge that the at-large, numbered place system of electing judges in Alabama has been continued, at least in part, for racially discriminatory reasons in violation of the Fourteenth and Fifteenth Amendments of the United States Constitution. The Government acknowledges that the institution of the at-large, numbered place system was not driven by any desire to dilute black voting strength. The Government concedes that such system for the election of judges dates from as early as 1915.

Alabama enacted the first statewide legislation requiring the use of at-large, numbered positions for the election of circuit judges in 1927. At that time there were no black attorneys in Alabama and blacks were largely disenfranchised. The historical evidence is clear that the numbered place law was a measure promoted by the conservatives in the Democratic Party, which saw its dominance threatened in the 1926 election by Progressive – Prohibitionist – Ku Klux Klan factions which had won elections.

I. ACT 221 AND NUMBERED PLACE SYSTEM

The Government argues that even though the at-large numbered place system had no discriminatory purpose when put in place, and even though judicial candidates have run at large for designated places, rather than in a "huddle," without change for sixty-five years, that Alabama maintains this system for electing judges for racially discriminatory purposes, and has done so at least since 1961[3] In 1961, the Legislature enacted Act 221 which required that numbered places be used to elect virtually all multimember offices in the state. The Government argues that even though all judges were required to be elected under an at large, numbered post election system prior to the passage of Act 221 and even though Act 221's passage had no effect on the system of

[3] Plaintiffs have offered no evidence that the at-large voting system for electing judges was racially motivated. The at-large system (i.e., vote by all electors in each circuit for all circuit judges, as opposed, for example, to election by single-member districts) was mandated in 1850 by amendment of the Alabama Constitution. There has been no change. In 1974, the Judicial Article became a part of the Constitution providing for circuit and district judges. This Article also provided that "all judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts." This Court finds no discriminatory purpose in the at-large voting system.

electing judges, such facts are not relevant "to the question of the state's motive in 1961 for requiring at large, numbered post judicial elections." This reasoning seems to stand logic on its head. Whatever one may find as to the reason for Act 221 requiring at large, numbered places for elections generally, the Act simply did not affect judicial elections.[4]

The Government's principal reliance for its argument that Act 221 was racially motivated is based on a statement by Mr. Mizell at a meeting of the Democratic Executive Committee in 1962. Mr. Mizell was urging that the method of electing members to the Democratic Executive Committee be changed so that candidates would run for numbered places. In referring to Act 221, he stated that the Legislature has changed voting procedures to numbered places "to protect the white people of Alabama." He also stated that the Legislature acted because of a concern in Madison County after a number

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[4] In *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), Judge Thompson found in considering a challenge to the use of at-large, numbered place elections for county commissioners that in 1961 the legislature "refashioned the at-large electoral system then in use in many counties and cities throughout the state" by means of numbered place laws. Judge Thompson concluded that such "refashioning" was racially inspired. Judge Thompson's finding did not directly involve judicial elections. Plaintiffs acknowledge that there was no such refashioning or change in the statewide practice of electing judges at-large and by numbered places, which had been the law statewide in Alabama at least since 1927.

Judge Thompson's finding was made at a preliminary injunction hearing in which defendants did not offer any evidence to dispute the view of plaintiff's expert who relied in large part on the discredited statement of Mr. Mizell. In this case, defendants have offered a great deal of credible evidence that the 1961 statute, Act 221, was not racially motivated. Although evidence presented in this case makes it extremely questionable that Act 221 had any racial motivation in any election, this Court only holds that it had no such purpose in judicial elections.

of black candidates "might near got elected" in a city council election where there were no numbered places.

The undisputed facts are: Mr. Mizell was not a member of the Legislature. He was a very vocal segregationist. He had nothing to do with the initiation or passage of Act 221. Act 221 was not inspired by any concern that numbers of blacks were running and being "might near" elected. There was one black candidate in a field of forty for five city council seats in Madison County. The black candidate ran twenty-fourth. These inaccuracies by Mr. Mizell hardly create confidence in other portions of his statement.

Mr. Mizell's statement as to the reason for Act 221 is not corroborated by any other account of the bill. Although plaintiffs' experts indicate that Act 221 was little publicized, implying that Mr. Mizell's account stands largely unrebutted in contemporaneous reporting, at least eight news articles discussing Act 221 appeared between May and September 17, 1961 in the Huntsville Times, Birmingham News, Mobile Register, and Montgomery Advertiser. Only two purposes were ever attributed to the bill. The Huntsville Times on May 31, 1961 wrote that the "objective of the bill [was] to prevent malfunction of voting machines due to makeshift throw-out straps being applied to them, and also to prevent blowing of fuses even when such straps are not on the machine but persons vote for more than one in the same race" (as in the 1960 Madison County primary). The Birmingham News on May 10, 1961 wrote that the bill was "aimed primarily at the possible failure of the Legislature to create new congressional districts" – that is – "if all candidates for Congress were forced to run statewide, then they would run for numbered places, rather than in a huddle for eight congressional seats."

(Alabama was to lose one congressional seat.) The Huntsville Times of May 11, 1961 and May 31, 1961 explained both purposes. Nowhere in any of the news coverage was any racial purpose suggested for Act 221. Newspapers fully reported that other measures considered by the 1961 Legislature were racially motivated, wherever they were so motivated.

As defendants point out, if Act 221 was inspired by fear of successful black candidates, why did the Act make an exception for school board, county commission, city council, etc., in Jefferson County? The exception removed all Jefferson County offices from numbered places, leaving only judicial offices and congressional seats in the numbered place category. Jefferson County had a substantial and growing black population, far more substantial than Madison County.

Finally, the authors of Act 221, testified that the Act had no racial motivation. Mr. Roberts, one of the two authors, testified in rejecting Mr. Mizell's claim that the Act was inspired by concern of a black being "might near" elected in Huntsville, that the black, who actually ran twenty-fourth, was a client and Mr. Roberts had given financial support to his campaign. Mr. Roberts testified that he barely knew Mr. Mizell and did not regard him as particularly reliable or knowledgeable about Act 221. Mr. Roberts was very clear that the bill had no racial discriminatory purpose.

Dr. Rogers, plaintiffs' expert, testified that Mr. Archer, another author of the bill who was also from Madison County, told him that the Act was unrelated to black voting. "The testimony of the actual decision makers" must be regarded as particularly persuasive in an intent inquiry, *Price v. Austin School Dist.*, 945 F. 2d 1307, 1318 (5th Cir. 1991), especially where the only contrary

statement comes from one with his own agenda and is full of other inaccuracies.

Mr. Bob Ingram, a highly respected reporter who covered the 1961 Legislature and wrote about the Act in the Montgomery Advertiser, September 12, 1961, remembers the numbered place law as he reported it in 1961, as a "redistricting measure" linked to the congressional elections. Plaintiffs offered no witness to rebut these observations by knowledgeable contemporaries of the time of the Act's enactment.

Finally, nothing in the evidence suggests that anything relating to judicial elections was of concern to the 1961 Legislature, and again Act 221 made absolutely no change in judicial elections.

2. JUDICIAL REFORM IN 1970 AS EVIDENCE OF VIOLATION OF FOURTEENTH AND FIFTEENTH AMENDMENT

Plaintiffs argue that those who succeeded in passage of the Judicial Article in 1970 continued to maintain numbered place systems in Alabama and the popular election of judges in order to dilute black voting strength. The argument rests on the fact that the sponsors of the Judicial Article did not reevaluate the numbered place system or the at large system for electing judges when the state adopted the Judicial Article, nor did they implement a change that judges be appointed rather than elected.

Sponsors of the Judicial Article, including then Chief Justice Heflin, acknowledge that they did not seriously consider providing in the Judicial Article that judges be appointed rather than popularly elected because they believed that such a provision would generate strong

opposition. They were certainly correct. Alabama has always had a strong populist base. Alabama elects many offices which in other states are appointed; e.g., state school superintendent, many county school superintendents, circuit court clerks, state auditor, state secretary of state, state treasurer, etc. The fact that Alabama voters choose to require election for these positions does not suggest that the choice is racially motivated. They have been elected offices for a century. Whatever the merits of appointment rather than election of judges – and states go both ways and with combinations of both – it would have been most unwise to put into the Judicial Article, which had to be approved by the voters, a very controversial provision which certainly would have generated opposition from many Alabamians who obviously have believed since 1850 that they should be allowed to elect their judges. Moreover, one wonders how an appointive system in 1971 was supposed to have been perceived as leading to more black judges when in 1971 there was less than one percent of Alabama attorneys who were black.[5]

As to plaintiffs' argument that the failure of the proponents of the Judicial Article to propose an alternative to the at-large, numbered place system indicates a purpose to discriminate, the same rebuttal applies as to the failure to propose the appointment of judges. Since 1850 when judges were first elected, judges were elected from an electorate that was contemporaneous with their jurisdiction. The fact that the proponents did not attempt to change this well established system and inaugurate a very questionable system where judges would be elected by only a part of the electorate in the jurisdiction over which they presided, proves nothing.

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[5] Judge Kennedy, a black circuit judge from Mobile, testified that it was the black representatives on the Judicial Reform Commission who sought and obtained a district judge in each of Alabama's sixty-seven counties.

This Court has expressed itself as believing that a worse system could not be imagined than abandoning the numbered place system and having all judges compete with one another and with new aspirants at election time. This indeed would probably result in "slating" and plaintiffs do not contend that this vice is in the present system.

SECTION 2 DOES NOT VIOLATE THE CONSTITUTION

Defendants argue that even though the Supreme Court in *Chisom* and *Houston Lawyers Ass'n* held that Section 2 of the Voting Rights Act applied to judicial elections, the Supreme Court did not resolve the question of whether the statute as so construed violates the Constitution. Defendants base this reasoning on the statement in *Chisom*: "Our decision today is limited in character. ... No constitutional claims are before us." *Chisom*, 111 S. Ct. at 2361. In the footnotes accompanying the quoted statement, however, the Court makes clear the type of distinct constitutional claims that were involved in certain of the other cases before the Court which were not present in the cases before the Court in *Chisom*.

For example, in *Wells v. Edwards*, 409 U.S. 1095 (1973), the Court had the question of whether election of state supreme court justices by districts violated the Equal Protection Clause. In *White v Register*, 412 U.S. 755 (1973), the Court had the question of whether a population differential among districts established a prima facie case of invidious discrimination under the Equal Protection Clause. In *Mobile v. Bolden*, 446 U.S. 55 (1980), an issue was whether at-large system of municipal elec-

tions violated black voter rights under the Fourteenth and Fifteenth Amendments.

The Court in *Chisom* was not laboring to determine whether Section 2 of the Act applied to judicial elections, remanding those cases to the trial courts "for further proceedings consistent with this opinion," and leaving unanswered whether the Act if applied to judicial elections was unconstitutional. Implicit in the *Chisom* and *Houston Lawyers' Ass'n* decisions is the Court's conclusion that Section 2 as amended when applied to judicial elections does not violate the Constitution.

CONCLUSION

In conclusion, this Court finds that the at-large numbered place election system in the jurisdictions at issue and the present circuit court configuration do not violate Section 2 of the Voting Rights Act nor the Fourteenth and Fifteenth Amendments to the constitution of the United States.

A separate judgment will be entered in accordance with this opinion.

DONE this 18th day of March, 1992.

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, pr procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

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No. 95-647

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, et al.,

Petitioners,

v.

JEFF SESSIONS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether the all-but-unanimous *en banc* Court of Appeals erred in (i) approving the district court's mainstream approach to vote dilution analysis, which consisted of a searching and practical evaluation of all relevant evidence to determine whether black voters have diminished opportunity in judicial elections, and (ii) affirming the district court's ultimate finding, under the totality of the circumstances, of the absence of vote dilution.

2. Whether, as every Circuit Court of Appeals considering the question has concluded, a state's multidimensional interest in conducting trial judge elections not from subdistricts, but from districts which coincide with the judge's territorial jurisdiction, can defeat a vote dilution claim which seeks instead the election of judges from race-based subdistricts.

PARTIES TO THE PROCEEDINGS

Petitioners' statement is correct except that certain officials listed there have been succeeded in office by the following:

Perry O. Hooper, Alabama Chief Justice;

Jim Bennett, Alabama Secretary of State;

John Crowder, Probate Judge, Chambers County, Alabama;

Leland Avery, Probate Judge, Hale County, Alabama;

Lamar Turner, Probate Judge, Henry County, Alabama;

Luke Cooley, Probate Judge, Houston County, Alabama; and

Albert Howard, Probate Judge, Russell County, Alabama.

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STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

A. Introduction

Respondents (hereinafter "the State") incorporate by reference the summary statement of the facts set out in the *en banc* decision of the Eleventh Circuit. *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1284-88 (11th Cir. 1995) (en banc). The State reviews and supplements the Court of Appeals' statement below, while also correcting and adding to Petitioners' statement. Occasional reference is also made to the district court opinion. *Southern Christian Leadership Conference v. Evans*, 785 F. Supp. 1469 (M.D. Ala. 1992).

B. Facts Relating to the Vote Dilution Inquiry

The Court of Appeals describes Alabama's unified judicial system with its two tiers of trial courts; 56 F.3d at 1284; sets out relevant demographic information regarding the 10 judicial circuits and four districts which were challenged; *id.* at 1284-85; observes that Alabama's trial judges are elected at-large from their circuit or district using a numbered-place system where a circuit or district has more than one judge; *id.* at 1285; and explains that mid-term vacancies are filled by gubernatorial appointment, limited in four large, multi-judge circuits by nominating commissions which certify potential appointees for the Governor's consideration. *Id.*

The *en banc* decision also relates the history of the at-large election system, which has been in place pursuant

to the State's constitution, for non-racial reasons, continuously since 1850. 56 F.3d at 1285. The Court also explains that the numbered-place feature was instituted almost 70 years ago, also for reasons having nothing to do with race. *Id.* at 1285-86. There was no evidence that the challenged election system, or any of its component parts, was established or is being maintained for racially discriminatory purposes. *Id.* at 1292.

Judges must be licensed to practice law in Alabama. The Court of Appeals recalled statistics showing that black lawyers comprise a very small proportion of Alabama's lawyers, statewide (about 295 out of 9600) and in the circuits and districts in question. 56 F.3d at 1286-87, 1296. Some of the challenged circuits and districts have almost no black lawyers, and there is no reason to assume that the few black lawyers who do practice there are necessarily interested in a judgeship. 785 F. Supp. at 1476, 1481; R7-253; R12-1181/82; Plaintiffs' trial exhibits 167 pp. 31-32, 169 pp. 34-36. In the urban jurisdictions where there are more black attorneys, one finds black judges on the bench in greater proportion than black lawyers in the local bar.[1]

The Court correctly noted the absence (for many years) of any racial restrictions on Alabama law school

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[1] In the 10th Circuit (Jefferson County), three of 35 trial judges (8.6%) are black, but only 3.48% of the lawyers are black. In Mobile County, the 13th Circuit, only 2.1% of the lawyers are black, but two of the 14 trial judges (14.3%) are black. Similarly, in Montgomery County, the 15th Circuit, one of 10 trial judges is black (10%), but only 5.29% of the lawyers are black. 785 F. Supp. at 1476; State's trial exhibit 87.

admissions, as well as the State Bar's aggressive efforts toward inclusiveness. 56 F.3d at 1287. Still, about one-third of all the black attorneys who have ever been licensed in Alabama gained their licenses in the last five years. Most judges practice law for several years before seeking or being considered for the bench, which is another factor in circumscribing the potential pool of black candidates. *Id.* at 1296; 785 F. Supp. at 1476.

Judicial appointments are a major component of the process for choosing judges. A large majority of trial judges in the challenged circuits and districts came to the bench by appointment rather than election. 56 F.3d at 1293 n.22; State's trial exhibits 83, 90-91, 116; 785 F. Supp. at 1475. Incumbency is often the determining factor in judicial elections, and therefore trial judge elections very often go uncontested. 56 F.3d at 1293 n.22; R13-1398/1402; 785 F. Supp. at 1475. The importance of initial appointments and incumbency serves, along with other distinguishing characteristics, to illuminate the differences between judicial elections and elections for legislative bodies. 56 F.3d at 1293.

The current black trial judges followed the typical route: almost all were first appointed rather than elected and, once in office, were reelected, usually without opposition.[2] 56 F.3d at 1288. The Alabama Supreme Court has had two black members, both of whom came to the court

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[2] Petitioners err in stating that "none of the black judges in majority white jurisdictions" came to the bench originally by election. *Petition* at 6. Judge Cook of Jefferson County was elected to the bench in 1976 against white opposition. 56 F.3d at 1287; 785 F. Supp. at 1482; R12-1330.

by appointment and one of whom, Justice Oscar Adams, twice thereafter defeated well-known white opponents in statewide contests. Justice Ralph Cook, who himself had defeated a white opponent for a circuit judgeship, succeeded Justice Adams in 1993. *Id.*

Few non-incumbent black candidates have run for judgeships in majority white jurisdictions. One was victorious and four others lost for reasons other than their race – lack of support from the black community, partisan voting, or a poor bar rating. 56 F.3d at 1287-88; 1293-94.

The evidence included analyses by the State's political science expert of all contested judicial elections (beginning in 1976) in the challenged circuits and districts, including the few contests involving black candidates. 56 F.3d at 1290-91. Petitioners' expert analyzed only black versus white contests and, thus, focused almost entirely on non-judicial elections. *Id.* at 1290. The candidate preferred by black voters won in 76% of circuit court elections and in 77% of district court elections, and the black-preferred candidate prevailed at the circuit level in 83% of all statewide judicial elections. *Id.* at 1291. In addition, the candidate supported by a majority of black voters won at least 50% of the time in each of the challenged circuits and much more frequently in many circuits. State's trial exhibit 36, tables 6, 8; *see* R13-1380/81, 1410. The Alabama Democratic Conference, a powerful statewide black political caucus, regularly endorses and supports black and white judicial candidates. 56 F.3d at 1287 and n.9. Most of the judicial candidates that ADC endorses are elected. R9-444.

C. Facts Relating to the State Interest Issues

Both the district court and the *en banc* Eleventh Circuit recognized the strong interest which Alabama has in linking a trial judge's territorial jurisdiction and electoral base. 56 F.3d at 1296-97; 785 F. Supp. at 1478-79.[3] Linkage, as in the Alabama model, protects the balance between the desire for judicial accountability and the need to maintain judicial independence. 56 F.3d at 1297. Linkage accommodates accountability by assuring that every voter within the judge's jurisdiction will have an opportunity to vote to fill the judgeship, which a subdistricting system would not permit. *Id.* at 1296-97.[4] Linkage at the same time serves to protect independence by keeping the electorate broad enough – not only through numbers but through diversity as well – to provide the

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[3] The State argued that the linkage interest should be recognized as a matter of law, but also presented substantial evidence, through the testimony of judges, lawyers, and a political scientist, of the importance of maintaining a judge's electoral base coextensive with the judge's jurisdictional base. *See* 785 F. Supp. at 1478-79; R10-841/45; R11-878/920, 983/85, 1032; R13-1367/73.

[4] As the Court of Appeals observed, subdistricting could especially disadvantage minorities. They would not be allowed to participate in the election of most judges, who would not be accountable to them but who would nevertheless make most of the judicial decisions that will affect them. These decisions would be made, moreover, by a "lone decisionmaker, a trial judge, who would lack input from the colleagues elected by the rest of the citizenry of the jurisdiction." 56 F.3d at 1297; *see Nipper v. Smith*, 39 F.3d 1494, 1543-44 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995).

elected judge a buffer against possible political repercussions of volatile and controversial cases. *Id.* at 1297; R11-903/06. Subdistricting, on the other hand, would "increase the specter of 'home cooking' "; creating a smaller electorate would increase the pressure to favor electoral constituents. 56 F.3d at 1297.

Petitioners did not establish, as they would have this Court believe, that judges would be immune from influence by narrow constituencies because they "already adjudicate disputes between residents of their circuits and persons who live elsewhere in the state." *Petition* at 10. There was, in fact, conflicting testimony over whether judges could be credited with total indifference to the popular will when they nevertheless must stand for election. *See, e.g.*, R11-903/04. District Judge Truman Hobbs understandably took the Hobbesian view. 785 F. Supp. at 1479.[5]

Petitioners misstate Circuit Judge Smith's testimony. *Petition* at 11. Although he agreed with Petitioners' counsel that, e.g., judicial canons of ethics and disciplinary procedures could ameliorate the possibility of unfairness to out-of-district residents somewhat, R11-943, this hardly stilled his fears or caused him to be sanguine about the prospect of subdistricting. As to multi-member

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[5] Further, disputes between in- and out-of-county residents do not pressure judges for favoritism as would in- and out-of-single member district conflicts. The former are relatively rare, R11-902, while the latter would be constant, and a disgruntled litigant or offended constituency could hurt a judge's reelection chances much less circuitwide than in a single-member district that is one-24th or even one-half the circuit's size.

subdistricts, Judge Smith said nothing to suggest that use of these would "dramatically reduce" problems caused by single-member districts; his view essentially was that a multi-member districting remedy, though perhaps not as bad, was still awful. *See* R11-919/20; 941; *cf.* R11-991 (multi-member district is like doctor saying you will have one leg cut off instead of two).[6]

II. THE DECISIONS BELOW

A. Introduction

The district court decided the case, and the *en banc* Court of Appeals affirmed it, on two alternative bases. 56 F.3d at 1284. First, the trial court concluded, and the Eleventh Circuit agreed, that Petitioners proved no actionable vote dilution under the principles of *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). *See* 56 F.3d at 1289-94. In the alternative, the courts below agreed that, because of Alabama's linkage interest

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[6] Contrary to their assertions, *Petition* at 10-11, Petitioners also did not establish that the judicial system in Mississippi has not been harmed by court-ordered subdistricting. Plaintiffs offered only the testimony of one black judge, who owed his election to subdistricting, who "[could not] say that [he had] seen anything negative," Plaintiffs' trial exhibit 172, p.22, and the observation of one white lawyer, who did not indicate that he consulted judges, litigants or the rest of the bar, that in his personal view "the system operates the same as it did before there was subdistricting." Plaintiffs' trial exhibit 173, p.22. The trial court obviously put little stock in this testimony, an appropriate reaction given the very short time in which the new system has operated. R11-936, 949.

in particular, the subdistricting remedy sought by Petitioners was not a feasible alternative to the challenged system. Relying on this Court's decision in *Houston Lawyer's Ass'n v. Attorney General of Texas*, 501 U.S. 419, 426-27, 111 S.Ct. 2376, 2381, 115 L.Ed.2d 379 (1991), the courts below therefore concluded that even if Petitioners' opportunity to participate in the challenged elections was being abridged, no remedy is available in this case. 56 F.3d at 1294; *see Nipper v. Smith*, 39 F.3d 1494, 1529 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995). The same conclusion would be inevitable, the Court of Appeals held, if a slightly different analytical model were employed. That is, if the court weighed the State's interest against "whatever possible vote dilution may have been shown", the State would prevail. 56 F.3d at 1297.

B. Resolution of the Vote Dilution Claim

Applying the "clearly erroneous standard", the Court of Appeals found no cause to disturb the district court's ultimate finding that "racially polarized voting did not leave minorities with 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " 56 F.3d at 1292-94. The *en banc* Court considered the district court to have "engaged in a searching and meaningful evaluation of *all* the relevant evidence", consonant with this Court's teachings in *Gingles*, and found the evidentiary record "ample" to support the district court's decision. *Id.* at 1293 (emphasis in original).

The Eleventh Circuit reviewed the lower court's "totality of the circumstances" analysis and found it not

only to be in keeping with settled law, *see* 56 F.3d at 1292, but particularly appropriate for a case involving judicial elections, which, as the Court observed, are characterized by "significant differences" from legislative elections, which are more often the focus of Section 2 litigation. *See id.* at 1293. The Court of Appeals approved of the district court's decision to consider *all* the election information supplied by the competing experts – including statistics drawn from non-judicial elections in which black candidates competed as well as from all judicial elections in the challenged jurisdictions, regardless of the candidates' race – but to be mindful of the differences between these types of elections by giving greater weight to the evidence drawn from judicial elections. *Id.* The district court was applauded for its refusal to accept the experts' respective invitations to ignore any but their evidence, and for its insistence on considering "any evidence that explained election results." *Id.* The reviewing court understood that the trial court also considered the other "contextual materials" relevant to a Section 2 vote dilution inquiry. *Id.* Summarizing, the Court of Appeals wrote as follows:

> [T]he district court undertook the requisite practical, searching inquiry required in Section 2 cases. *Gingles*, 478 U.S. at 45, 106 S.Ct. at 2764. The court appropriately considered all the circumstantial evidence – both statistical and anecdotal – that was offered.

Id. at 1292; *see Nipper*, 39 F.3d at 1527 (explaining the need to consider a wide variety of circumstances when evaluating vote dilution claims and observing that "the types

of evidence that would be relevant . . . plainly defy categorization.").[7]

C. The Alternative State Interest Holding

In the courts below, Petitioners sought a remedy which would divide the challenged circuits and districts into single or multi-member election districts to ensure the election of blacks to judgeships. 56 F.3d at 1289.[8] Such

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[7] Petitioners criticize the district court for attaching significance to the small number of black lawyers in the challenged jurisdictions and for comparing the percentage of black lawyers to the percentage of black judges. *Petition* at 13. Not only is this evidence relevant to a factor explicitly made part of vote dilution analysis by the very language of Section 2 – the degree of *success* of black candidates – it is exactly the kind of circumstantial evidence that is essential for consideration in the "totality of the circumstances" analysis. *See Nipper v. Smith*, cited in accompanying text. While recognizing that the fact blacks have been elected to judgeships in numbers disproportionate to their numbers in the bar was only one factor to be considered, 785 F. Supp. at 1477, the district court charitably characterized as "amazing" Petitioners' argument that this evidence was utterly irrelevant. *Id.* at 1476.

[8] Petitioners disclaim having proposed as a remedy a modified at-large election system, such as cumulative voting, which would, among other changes to the existing election system, do away with the numbered-place feature and require that judges run against one another. *See* 56 F.3d at 1296 n.24; *Petition* at 12. Observing that "a worse system could not be imagined", the district court had correctly held that the State has a strong interest in avoiding the problems that would inevitably be associated with such a system. 785 F. Supp at 1490, 1477. The Eleventh Circuit heartily agreed, characterizing as "invidious" the effects – on the collegiality of the court as well as on lawyer

subdistricting would eliminate the linkage between the judges' territorial jurisdictions and their electorates, and would in the process disfranchise the voters in the judge's jurisdiction who reside outside the election subdistrict. *Id.* The State contended, and both courts below agreed, that the subdistricting remedy was "unfeasible, given the State's legitimate interest in maintaining the linkage between a trial court's jurisdiction and elective base and guaranteeing a pool of potential candidates large enough to give the voters a reasonable choice . . . " *Id.* at 1289.[9]

Expounding on the district court's decision, the Eleventh Circuit examined the importance of linkage and the serious problems associated with subdistricting. Linkage

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interest in a judicial career – which eliminating the numbered-place feature would have. 56 F.3d at 1296 n.24.

[9] Another remedy which was sought by Petitioners was a reconfiguration of several multi-county circuits in order to create majority-black circuits. *See* 56 F.3d at 1294-96. This proposal was rejected by the district court and the Court of Appeals for the same reasons, including the fact that the existing circuits are maintained for reasons relating to caseload, population density, and other factors which affect the allocation of judicial resources, and that the only reason for the proposed change would be to elect black judges, making race "the linchpin of the judicial system." *Id.* at 1295; *see* 785 F. Supp. at 1477. The courts below emphasized, moreover, that many of the counties proposed for realignment into black circuits have few if any black lawyers, a circumstance of serious concern given "[t]he State's interest in having a pool of black lawyers large enough to give the voters a reasonable choice." 56 F.3d at 1296. Petitioners mention their unsuccessful challenge to the circuit configuration, but declare its details "not relevant to the questions presented" by their Petition. *Petition* at 2 n.2.

holds trial judges accountable to all the voters in their territorial jurisdiction, while subdistricting disfranchises all but those who reside in the subdistrict. At the same time, linkage offers the judges a buffer from the whims of a small electorate or special interests and thus avoids *too much* "responsiveness"; subdistricting, however, brings the judge too close to the electorate, increasing the pressure to favor constituents and the "specter of home cooking." 56 F.3d at 1296-97; *see Nipper*, 39 F.3d at 1544.

Pointing out that the "responsiveness" concern associated with subdistricting has a racial component as well, the Court of Appeals wrote as follows:

> It has been written that remedial plans in the legislative context may "reinforce[] racial stereotypes and threaten[] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw v. Reno*, ___ U.S. ___, ___, 113 S.Ct. 2816, 2828, 125 L.Ed.2d 511 (1993). This proposition seems quite accurate in the context of state trial court judges who must not engage in traditional legislative "responsiveness."

56 F.3d at 1297; *see Nipper*, 39 F.3d at 1543-44. Rejecting Petitioners' argument that codes of judicial ethics and appellate review provide adequate safeguards against favoritism concerns, the circuit court went on as follows:

> [O]nce court-ordered subdistricting sends the message, as it inevitably would, that race matters in the administration of justice, no procedure could mitigate the devastating effects. If favoritism concerns were rooted in racial issues, the fundamental fairness of the judicial system

> would continually be questioned. Such a redistricting remedy would reintroduce, to a greater degree, the very vices from which the appellants seek relief.

56 F.3d at 1297.

Applying principles it had discussed in greater detail a few months earlier in its *en banc Nipper v. Smith* decision, the Eleventh Circuit therefore concluded that, even "assuming that [Petitioners'] opportunity to participate in the challenged elections was being abridged", the State's interest in its existing judicial election system precluded the subdistricting remedy proposed by Petitioners and a finding of a Section 2 violation.[10] 56 F.3d at 1294, citing *Houston Lawyers' Ass'n*, 501 U.S. at 426-27.[11]

Recognizing that *Houston Lawyers' Ass'n* leaves some room for courts to craft the precise analytical model for

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[10] In *Nipper*, the Court of Appeals explained that availability of a workable remedy within the confines of the state's system of government is a threshold requirement of Section 2 and critical to the success of a vote dilution claim, and concluded that subdistricting for Florida trial judge elections was not a workable remedy, thus precluding Section 2 liability. 39 F.3d at 1530-33, 1542-47.

[11] Although its principal focus was on the State's linkage interest, the Court of Appeals joined the district court in recognizing the additional and closely related state interest in avoiding election subdistricts which, especially in jurisdictions which already have only a handful of lawyers, would not offer a pool of black lawyers of sufficient size to give voters "a reasonable choice from which to select a qualified candidate." 56 F.3d at 1296; *see* 785 F. Supp. at 1479-80. This interest in an adequate pool was considered important by the Eleventh Circuit also on Petitioners' circuit reconfiguration claim, which is not raised in their Petition. *See* note 9 *supra*.

considering the importance of the State's interest in the Section 2 calculus, the Eleventh Circuit emphasized that its remedy-oriented model was not the only approach which would lead to the correct result. If Alabama's important interests were balanced against proven vote dilution, the Court held in the alternative, "these interests outweigh whatever possible vote dilution may have been shown in this case." 56 F.3d at 1297.

REASONS FOR DENYING THE WRIT

I. REVIEW IS NOT WARRANTED BECAUSE THE ELEVENTH CIRCUIT HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY CHARACTERIZING THE QUESTIONS BELOW IN A MANNER INCONSISTENT WITH THIS COURT'S DECISION IN *THORNBURG V. GINGLES*.

Petitioners maintain that this case is worthy of Supreme Court review because, they say, the *en banc* Eleventh Circuit improperly considered the legal issues Petitioners presented on appeal to be subsumed within a challenge to the district court's finding on the ultimate factual issue of whether vote dilution was present. Petitioners argue that this alleged error was of such magnitude that an exercise of this Court's supervisory power is called for to correct it. This argument is without merit for two reasons. First, the Eleventh Circuit properly (if implicitly) rejected Petitioners' claims of legal error because the contrary result would have excluded relevant facts from the Court of Appeal's consideration of the totality of the circumstances. Second, even if Petitioners

are correct that the *en banc* Court erred in some respect, Petitioners have failed to show how the outcome of the case was affected.

The fact that Petitioners thought they were raising some issues on appeal that were legal, not factual, was not lost on the Eleventh Circuit. The Court wrote: "Appellants contend that the district court's finding that the challenged electoral systems do not afford them less opportunity than other members of the electorate to participate in the political process and to elect candidates of their choice is clearly erroneous. According to appellants, the district court should have found to the contrary *as a matter of law.*" *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1292 (11th Cir. 1995) (*en banc*) (emphasis added) (hereinafter *"SCLC"*). Nor did the responsibility to correct errors of law that might affect its factual inquiry escape the Court of Appeals. Indeed, in its opinion in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995), which was argued along with the instant case, the Eleventh Circuit specifically recalled the admonition of *Thornburg v. Gingles*, 478 U.S. 30 (1986), that although "[t]he determination of vote dilution . . . is subject to review under the clearly erroneous standard of Rule 52(a)," that rule " 'does not inhibit an appellate court's power to correct errors of law . . . .' " *Nipper*, 39 F.3d at 1537 n. 82 (quoting *Gingles*, 478 U.S. at 79).

In this case, the circuit court simply did not encounter any errors of law committed by the district court that it thought required correction. The legal errors claimed by Petitioners – that the district court "applied the wrong standard by focusing on black voters' opportunity 'to

influence' elections rather than on their opportunity 'to elect' candidates of their choice"; "focused on the wrong elections when it relied on the results of white vs. white contests given that blacks had been deterred from running"; improperly "treated the case like an employment discrimination dispute and compared the percentage of black lawyers to the percentage of black judges"; and wrongly "credit[ed] state interests [in having an adequate pool of lawyers to draw from in electing judges] that the state itself did not contend it had," *see Petition* at 23-24 – go to the question of what evidence a court may consider in evaluating a Section 2 claim. In essence, Petitioners' "legal" claims asked the circuit court to rule that the district court could not take into account a number of *facts*: the fact that minority influence on all judicial elections would be diminished by subdistricting; the fact that black voters had been highly successful in electing their candidates of choice in white versus white contests; the fact that the proportion of African-Americans holding elected judicial office in Alabama substantially exceeds the proportion of black lawyers in the bar; and the fact that the State has a vital interest – whether this interest was directly asserted by Respondents or fairly inferred by the district court from the evidence – in having a pool of black lawyers of sufficient size to offer a reasonable choice to voters.

However, the Eleventh Circuit declined, as did the district court, to ignore *any* relevant evidence. Instead, according to the circuit court, the district court "appropriately considered all of the circumstantial evidence – both statistical and anecdotal – that was offered." *SCLC*, 56 F.3d at 1292; *see also id.* at 1293 ("the district court

engaged in a searching and meaningful evaluation of *all* the relevant evidence concerning the challenged trial court jurisdictions."); *id.* at 1291, 1297 (discussing subdistricting's effect on minority influence); *id.* at 1291, 1293 (evaluating significance of white vs. white elections); *id.* at 1286-87 (comparing the proportion of black lawyers with the proportion of black judges); *id.* at 1296 (noting the state's interest in an adequate pool of black lawyers). As the Eleventh Circuit recognized, this approach is dictated by this Court's holding in *Gingles*, and the more recent case of *Johnson v. DeGrandy*, 512 U.S. ___, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). *See Gingles*, 478 U.S. at 79 (consideration of the totality of the circumstances based upon a searching practical evaluation of the past and present reality is "peculiarly dependent upon the facts of each case."); *DeGrandy*, 129 L.Ed.2d at 791 ("the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts."); *Nipper*, 39 F.3d at 1527 ("A court should not exclude certain types of relevant evidence – certain colors on the canvas – from its examination if doing so would leave an incomplete view of the circumstantial evidence picture."). The Court of Appeals did not err in this regard.

Finally, even if the Eleventh Circuit did substantially recast Petitioners' claims of error in any respect – a common hazard of appellate review, not a cataclysmic deviation from the accepted course of judicial proceedings – Petitioners fail to explain how the result of the case was affected. Their bare assertion that the court's alleged error "may have determined the outcome of the case,"

Petition at 24, without more, amounts to a concession by omission that Petitioners cannot explain exactly how this "outcome" might have been affected. No significant substantive point raised by Petitioners was left unaddressed by the circuit or district court. Repetition by this Court of the review of Petitioners' case already exercised by the district court, and by the Eleventh Circuit sitting *en banc*, would serve no useful purpose and would correct no departure from the accepted and usual course of judicial proceedings worthy of granting the writ of certiorari.

II. REVIEW IS NOT WARRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE PROPER TREATMENT OF STATE INTERESTS IN VOTING RIGHTS CASES.

Petitioners also argue that this Court should grant certiorari to resolve an alleged conflict between the Eleventh Circuit, on the one hand, *see SCLC v. Sessions*, 56 F.3d 1281 (11th Cir. 1995) (*en banc*); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1795 (1995), and the Fifth and Sixth Circuits on the other, *see League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*) ("*LULAC*"), *cert. denied*, 114 S.Ct. 878 (1994); *Cousin v. McWherter*, 46 F.3d 568 (6th Cir. 1995). According to Petitioners, the Eleventh Circuit takes the position that a state's interest in its judicial election system "has minimal relevance in the totality of the circumstances analysis," but plays a "major role" in the factual determination of whether there are feasible, alternative remedies to the challenged election system. *Nipper*, 39 F.3d at 1542. Petitioners say that this approach conflicts with the Fifth and Sixth Circuits' view that it is

necessary to balance the state's interest, whose weight is a question of law, against evidence of vote dilution in evaluating the totality of the circumstances. *See LULAC*, 999 F.2d at 868; *Cousin*, 46 F.3d at 577.

Petitioners' argument should be rejected for several reasons. First, the "conflict" alleged was not created by the instant case; instead, it arose, if at all, in the Eleventh Circuit's decision in *Nipper*, where the principle of law to which Petitioners refer was actually set out. *Nipper*, 39 F.3d at 1542.[12] This Court has already declined to grant certiorari in the *Nipper* case, which involved a similar Section 2 challenge to the election of Florida judges. *See Nipper v. Smith, cert. denied*, 115 S.Ct. 1795 (1995).

Second, if there is a conflict, as alleged, it is one that has no adverse consequences for Petitioners. On the contrary, Petitioners do not, and cannot, explain how the result in this case would be different if this Court instructed the Eleventh Circuit to follow the Fifth and Sixth Circuits in finding that the state's interest *is* relevant in the totality of the circumstances analysis, and must be balanced against any evidence of vote dilution (assuming that the Eleventh Circuit did not in fact

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[12] Interestingly, petitioners in the *Nipper* case did not perceive the conflict asserted here. Instead, they maintained that *Nipper* was in conflict with decisions of the Fifth and Sixth Circuits because *Nipper* held, according to petitioners in that case, that "the state's interest in retaining existing judicial election districts outweighs, as a matter of law, any and all evidence of vote dilution," *Petition* in *Nipper* at 24 – thus suggesting, ironically, that the *Nipper* petitioners thought that the Eleventh Circuit *did* weigh this interest in the totality against evidence of vote dilution.

already do this).[13] Here, the Eleventh Circuit concluded in Part III. A of its decision that there *was* no vote dilution, without even reaching the state interest question; as an alternative holding only the Court determined that, assuming vote dilution, no remedy was available because of the state's interests in the present electoral system. Therefore, no vote dilution existed in this case against which the Court could be admonished to weigh the state's interests (if it did not do so), and no different resolution of the case could result for Petitioners.

Finally, there is no material – much less irreconcilable – conflict between the Eleventh Circuit and the Fifth and Sixth Circuits in these cases in any event. In each of the decisions cited, the respective circuit courts properly recognized the district courts' obligation to conduct a "searching practical evaluation of the past and present reality," and to employ a "functional view of the political process." *Thornburg v. Gingles*, 478 U.S. at 45; *see also SCLC*, 56 F.3d at 1293; *Cousin*, 45 F.3d at 576; *Nipper*, 39 F.3d at 1527; *LULAC*, 999 F.2d at 860. In all these cases, the circuit courts duly followed this Court's admonition in *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991), that the state's interest is "a legitimate factor to be considered by courts among the 'totality of the circumstances' in determining whether a Section 2 violation has occurred." *Id.* at 427; *see also SCLC*, 56 F.3d at 1294; *Cousin*, 46 F.3d at 574; *Nipper*, 39 F.3d at 1541;

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[13] If Petitioners do *not* want this Court to resolve the alleged conflict in favor of either the Eleventh Circuit's or the Fifth and Sixth Circuit's approach but, instead, advocate an entirely new analysis, then a *conflict* of the circuits under Rule 10(a) is not the correct justification for their petition.

LULAC, 999 F.2d at 869. And, in the three cases in which the circuit court reached the merits of the plaintiff's claims (the *Cousin* case did not, *Cousin*, 46 F.3d at 577), the result uniformly was that each state's system for electing its trial judges – systems in Alabama, Florida and Texas which were, in the main, quite similar – was sustained against Section 2 challenge. *See SCLC*, 56 F.3d at 1297; *Nipper*, 39 F.3d at 1547; *LULAC*, 999 F.2d at 837.

The Eleventh Circuit's observation in *Nipper* that Florida's so-called "linkage" interest had "minimal relevance in the totality of the circumstances analysis in [that] case," *Nipper*, 39 F.3d at 1542, does not indicate that this interest was not *considered* in the totality. On the contrary, the Eleventh Circuit explicitly acknowledged that "Florida's interest in maintaining the current electoral systems . . . should be taken into account in determining whether, under the totality of the circumstances, the appellees have violated section 2," following the command of *Houston Lawyers' Ass'n*. *Id.* at 1541 (citing *Houston Lawyers' Ass'n* , 501 U.S. at 426); *see also Nipper*, 39 F.3d at 1535 n. 77 ("The policy underpinning the linkage provided by the challenged schemes is a factor to be taken into account in deciding whether, under the totality of the circumstances analysis, the appellants have presented a case of vote dilution. We take this policy into account *infra* part IV. D.") (citation omitted); and *id.* at 1547 ("Among the factors a court must consider in conducting [the totality of the circumstances] analysis is the state policy advanced by the judicial scheme at issue."). The Eleventh Circuit simply concluded, in considering the state's interests in its totality inquiry, that the linkage interest specifically "neither establishes nor rebuts the

existence of racial bias in the community" and, thus, it had little impact on the totality analysis in that case. *Id.* at 1542. Without discussion, the Eleventh Circuit apparently followed *Nipper* in this regard in deciding *SCLC*. These decisions do not depart significantly from the *LULAC* case, in which the Fifth Circuit noted that "[a] substantial state interest . . . is not raised to *disprove* the existence of dilution," but rather is "weighed *against* proven dilution to assess whether such dilution creates § 2 liability." *LULAC*, 999 F.2d at 871 (first emphasis added; second emphasis in original); *see also Cousin*, 46 F.3d at 577 (implicitly following the *LULAC* analysis).

Nor do the *Nipper* and *SCLC* decisions substantially diverge from the *Cousin* and *LULAC* doctrine that state interests are to be weighed against proven vote dilution. *See Cousin*, 46 F.3d at 577; *LULAC*, 999 F.2d at 868. Indeed, in *Nipper*, four of the six judges in the plurality (Edmondson, Cox, Birch and Dubina, J.J.) explicitly noted their view that Florida's state interest is, "as a matter of law, great and outweighs (either at the vote-dilution-finding-stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here."[14] *Nipper*, 39 F.3d at 1547 (*citing, inter alia*, *LULAC*, 999 F.2d at 868). Even more important to the petition in the instant case, the majority of the *en banc* court in *SCLC* expressly

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[14] Although Petitioners claim in their Petition that the Eleventh Circuit does not consider the weight of a state interest to be a question of law, they offer no citation in support of this assertion, which is belied by the only explicit statement directly related to this point in these cases, quoted above.

held that if there *were* any vote dilution, the state's interests "outweigh whatever possible vote dilution may have been shown in this case." *SCLC*, 56 F.3d at 1297.

Under these circumstances, any alleged conflict in the circuit courts is illusory, and the writ of certiorari is accordingly due to be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

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